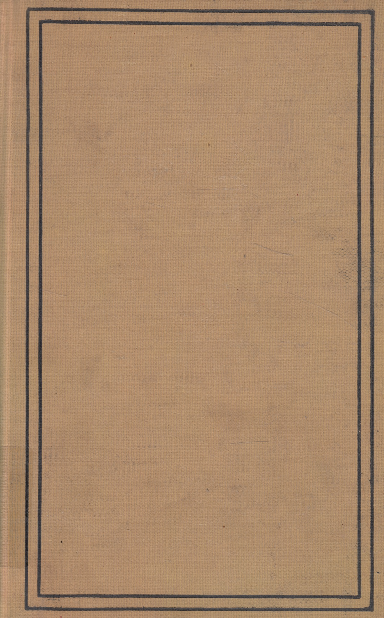








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

FEBRUARY 1, 1943, TO MARCH 31, 1943

WITH

REPORT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY
JAMES A. HOYT

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[1] On military leave, as of November 2, 1942; lieutenant commander, U. S. Naval Reserves, on active duty.
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CASES DECIDED

IN

THE COURT OF CLAIMS

February 1, 1943, to March 31, 1943, and other cases not heretofore published.

JACOBSON BROTHERS COMPANY v. THE UNITED STATES

[No. 43009. Decided October 5, 1942. Plaintiff's motion for new trial overruled February 1, 1943]

On the Proofs

Government contract; effectiveness of release; deduction by Comptroller General; liquidated damages.—Where plaintiff, contractor, entered into a contract with the Government for the construction of an addition to the Library of Congress; and where, upon plaintiff's statement to the contracting officer representing the defendant that plaintiff was making no claims against defendant based on any supposed breaches of contract on the defendant's part and upon plaintiff's execution of a complete release, with no exceptions, the contracting officer decided that it would be equitable to grant plaintiff extensions of time aggregating 272 days, the number of days after the agreed date on which the contract was completed; and where the contracting officer recommended settlement on such basis, thus wiping out any liability on plaintiff's part for liquidated damages; and where settlement was effected on that basis, with the exception of one item; it is *held* that plaintiff is not entitled to recover except for said one item, deducted by the Comptroller General.

Same.—Where upon final settlement between contractor and the Government, contractor executed a complete release without any exceptions; and where thereupon the Comptroller General issued a certificate of settlement for the amount of the voucher recommended by the contracting officer less $900 deducted by the Comptroller General for liquidated damages for nine days' delay; and where Treasury check in the amount named in the said certificate of settlement was issued to plaintiff and plaintiff accepted and cashed said check; it is *held* that the contract bound plaintiff to

give a release which would be effective except as specific matters were reserved for further claim or litigation and the release given had such effect.

Same.—Deduction of an amount by the Comptroller General in final settlement of contract did not destroy the effectiveness of complete release by contractor as a defense to a suit against the Government on a validly released claim.

The Reporter's statement of the case:

Mr. Louis M. Denit for plaintiff. *Brandenburg & Brandenburg* were of counsel.

Mr. James J. Sweeney, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of Delaware.

2. March 31, 1932, plaintiff entered into a contract (Symbol No. AC–cong–70) with the defendant, represented by its contracting officer, David Lynn, Architect of the Capitol, whereby plaintiff, for the consideration of $1,123,000, agreed to furnish all labor and materials and perform all work required for the construction of an addition to the Library of Congress, in accordance with designated specifications, schedules, drawings and other documents, the work to commence within ten calendar days after date of receipt of notice to proceed and be completed within 400 calendar days from date of such receipt.

The work included the reconstruction and remodeling of certain parts of the existing east book stack, reconstruction and remodeling of the East Main Building together with corridors adjacent thereto, remodeling of parts of the East North and East South curtains adjacent to the East Main Building, the extension and addition to the present building; the reconstruction of the vaults below grade, and the new equipment, driveways, and approaches, all as required by the drawings and specifications. The contractor was also required to protect certain parts of the existing structure and equipment therein, to relocate equipment and piping, and to maintain the continued service of drinking water cooling and circulation and brine cooling and circulation. Unit prices were submitted for the following items:

1. Excavating for footings or other work below cellar floor.

2. Earth fill and grading same.

3. Reinforced concrete footings including forming and reinforcing steel.

4. Reinforced concrete walls including forming and reinforcing steel.

5. Plain 1–2–4 mixture concrete.

Plaintiff furnished a performance bond in the penal sum of $561,500, with the United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety.

The contract and its documents are in evidence and are made part hereof by reference.

3. On April 14, 1932, plaintiff received notice to proceed, thereby fixing the date for completion as May 19, 1933.

Plaintiff commenced work May 11, 1932, and completed it February 14, 1934. Plaintiff thus used 272 days in excess of the originally agreed time of 400 days.

At the time of final settlement the Architect of the Capitol, who was the contracting officer, waived all delays and did not assess any liquidated damages against the contractor. He allowed time extensions aggregating 272 days as follows:

Causes of extensions	Periods	Days
Approval of Granite	4–13 to 5–7–32	25
Changes—Bookstack Designs	7–1 to 9–7–32	56
Soil Condition & Footings	7–26 to 8–8–32	13
Changes—Underpinning	8–5 to 9–29–32	22
Changes—In Cellar Between	2–24 & 7–1–33	30
Changes—Lintels	3–2 to 3–7–33	6
Labor Trouble—Granite Workers	4–3 & 4 & 5–22–33	3
Changes—Flashing	6–13 to 6–14–33	2
Strike—Lathers & Plasterers	6–22 to 7–25–33	34
Changes—Air Ducts	8–7 to 8–31–33	25
Strike—Painters	12–30–33 to 1–7–34	9
Changes—Painting Rare Book Reading Room	1–11 to 1–22–34	11
Unfavorable Weather	10–6–32 to 5–16–33	26
Unfavorable Weather	Sundays & Holidays	10
Total		272

During the progress of the work, plaintiff requested time extensions greatly in excess of the 272 days allowed. On most occasions the contracting officer deferred final action on plaintiff's requests for time extensions until the time of final settlement. As to many of the delay periods, there were two or more concurrent delays on different parts of the

work. Plaintiff did not at any time suspend all of the contract work on account of such delays. The contract provided that plaintiff should pay to the defendant $100 per day for each calendar day's delay in the completion of the contract, subject to the provisions of Article 9 of the contract.

4. Article 3 of the contract provided that the contracting officer might make changes in the drawings or specifications within the general scope of the contract.

Under this article of the contract the contracting officer made changes, adding to the contract price or deducting therefrom, by orders as follows:

Serial No.	Date of order	Subject of change	Decrease	Increase
	1932			
1	July 29	Lighting, card index and union catalogue rooms		$544.59
2	Aug. 8	Porcelain receptacles, outlet boxes, Rare Book Reading Room	$18.75	
3	Aug. 20	Labor incident to moving electrical equipment	40.00	
4	Aug. 27	(*a*) Steel framing over Card Index Room		171.52
		(*b*) Opening in concrete wall		37.37
5	Sept. 7	Bookstack construction	1,242.32	
6	Sept. 22	(*a*) Base in telephone booths		36.30
		(*b*) Bronze entrances to elevators		295.24
		(*c*) Vision panels in elevators		41.14
7	Oct. 31	Concrete and brick underpinning		5,250.28
8	Nov. 22	(*a*) Generator sets		630.77
		(*b*) Steel struts		37.73
9	do	Openings for pneumatic tubes		135.99
10	Dec. 20	Brickwork in recess vacated by bookstack elevator		260.63
11	Dec. 21	Water supply line		90.75
12	Dec. 22	Sewers, drains, sump pumps		912.24
13	Dec. 28	(*a*) Four blocks rock-faced granite		786.50
		(*b*) Parging		993.41
	1933			
14	Jan. 6	Plastering	1,394.00	
15	Jan. 12	(*a*) Elevating sewer		48.40
		(*b*) Drains		133.10
16	do	Brine cooler		147.62
17	Jan. 25	(*a*) Card index cases, Card index and Union Catalogue Rooms		3,453.45
		(*b*) Fire-resisting treatment, Rare Book Reading Room and Exhibition Hall	700.00	
18	Jan. 30	Location of steel channels		55.40
19	Feb. 17	Electrical installation		1,245.09
20	Mar. 17	(*a*) Drinking-water fountains	54.00	
		(*b*) Pipe trenches		135.95
		(*c*) Copper flashing		83.49
21	Mar. 24	Connecting drain		105.16
22	Apr. 1	Glazed wall tile		127.05
23	Apr. 8	Structural steel lintels over two windows		238.52
24	Apr. 8	(*a*) Terra cotta tile, elevator shafts	600.00	
		(*b*) Air compressors	376.00	
		(*c*) Toilet paper holders	6.27	
25	Apr. 14	Dehumidifier and air washer		121.52
26	Apr. 21	Motor controller	85.00	
27	May 2	Pipes and pipe covering	425.00	
28	do	Roof drains	70.00	
29	May 12	Fill around columns		85.91
30	do	Steam heating system		243.21
31	May 15	Electric controls	282.00	
32	May 23	Trenches and manholes, electric substation		381.27
33	June 9	Insulation, hot water generator	31.00	
34	June 22	Fill in doorway between Exhibition Hall and Machine room		30.00

Reporter's Statement of the Case

Serial No.	Date of order	Subject of change	Decrease	Increase
	1933			
35	June 23	Brine suction line		$60.50
36	June 29	Foundations, footings, test pits, etc		3,472.80
37	July 1	Cellar		3,236.80
38	July 14	(*a*) Copper flashing		89.54
		(*b*) Bookstack struts		72.60
39	July 19	Refrigeration pipe		650.08
40	July 25	Toilet drains	$10.50	
41	do	Ceiling height, first-floor corridor	4.00	
42	Aug. 3	(*a*) Heating and ventilating		575.87
		(*b*) Access doors, pipe shafts		84.70
43	Aug. 4	Structural steel work over interior chase		45.50
44	Aug. 14	Electrical apparatus	5,000.00	
45	Aug. 16	(*a*) Elevator push buttons		45.38
		(*b*) Floor outlets, Card Index Room	35.35	
46	do	Bronze thresholds	24.75	
47	Aug. 31	Moving of gasoline pump	61.00	
48	Sept. 19	Bookstack elevator shaft		35.09
49	Sept. 20	Ornamental plaster		60.50
50	Sept. 22	Radiator enclosures		151.25
51	Oct. 13	Circuit breakers		60.50
52	Oct. 14	Concrete fill		49.60
53	Oct. 17	Suspended ceiling		242.00
54	Nov. 9	(*a*) Concrete drain		527.62
		(*b*) Sidewalk		370.99
		(*c*) Electric switches		31.46
55	Nov. 14	(*a*) Plastering		71.39
		(*b*) Surface of old marble floors		254.10
	1934			
56	Jan. 9	(*a*) Hardware		34.24
		(*b*) Closers for book-stack doors	11.00	
		(*c*) Chair rail		133.05
		(*d*) Air motors	25.00	
57	Jan. 19	(*a*) Light in air washer		38.97
		(*b*) Bar lock, elevator door		42.35
58	Jan. 30	(*a*) Aluminum window painting	60.00	
		(*b*) Painting walls and ceilings		571.36
59	Feb. 13	Heaters for workshop	45.50	
60	Feb. 23	(*a*) Electrical work, ventilating system		48.40
		(*b*) Route of air ducts, ceiling in Union Catalogue room		467.45
		Total	10,601.44	28,383.69
		Net increase	17,782.25	

The change orders thus effected an increase in contract price from $1,123,000.00 to $1,140,782.25.

Article 16 (d) of the contract provided:

Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

5. Plaintiff's final requisition for payment, dated February 23, 1934, was executed after the acceptance and completion of the work on February 14, 1934. It contained the following material matter:

Final amount due________________________$59,282.25

> We certify that the above requisition is correct and just and that payment has not been received.
>
> JACOBSON BROTHERS COMPANY,
> By VICTOR JACOBSON,
> *Assistant Secretary and Treasurer.*

The amount, $59,282.25, claimed in plaintiff's final requisition, was the difference between the contract price as increased by the change orders and the amount theretofore paid plaintiff on account of the contract.

Before final settlement, the assistant to the Architect of the Capitol conferred with plaintiff's representative and explained the desire of the contracting officer to be just and reasonable with respect to the extensions of time under the contract requested by plaintiff and sought plaintiff's assurance that no claims relating to the contract would be made by it. Plaintiff's representative said that no claims would be made.

The contracting officer in an effort to be fair and just took into consideration the fact that the work had been performed during a time of financial difficulty, that a good job had been done, that the defendant had occupied a part of the premises before completion of all the work, that the contractor had, without any excuse recognized by the contract, on occasions delayed the work, but that there had been delays caused by both parties. Considering the whole situation and the assurance made by plaintiff that no claims would be asserted under the contract, he determined not to assess any liquidated damages against plaintiff.

March 23, 1934, the Architect approved the final voucher in the full amount claimed by plaintiff, and forwarded to plaintiff two unexecuted copies of a release, together with the following letter:

> Kindly execute this Release and return both of the copies to this office at your earliest convenience in order that the final payment voucher in favor of your com-

pany, which is now being held in this office, may be promptly forwarded to the General Accounting Office for consideration and final settlement.

It is of course understood that, although this office has certified the final payment voucher in the full amount requested by your company, the matter of actual assessment or waiving of liquidated damages which may have accrued for periods of delay in the completion of your contract is one that is beyond the jurisdiction of this office, such authority being, instead, vested by law in the Comptroller General of the United States.

Plaintiff delivered the release executed in duplicate to the Architect of the Capitol by letter dated April 16, 1934, and stated:

> We have executed these releases and are returning both of them to your office as per our telephone conversation of today with your Mr. Rouzer, and as I understand it, as soon as the releases are received at your office you will at once release the payment voucher in favor of our company, which has been held up in your office awaiting these releases.

This letter and the release were signed by Jacob Jacobson, president of the plaintiff corporation.

The release provided as follows:

> Pursuant to provisions of Contract AC–cong–70, dated March 31, 1932, by and between The United States (the Government) and Jacobson Brothers Company (the contractor) for furnishing all labor and materials and performing all work required for the construction of an Addition to the Library of Congress, Washington, D. C., and in consideration of the payment by the Government of the total sum of One million, one hundred forty thousand, seven hundred eighty-two and 25/100 dollars ($1,140,782.25), the receipt of which is acknowledged, the contractor does hereby release the Government from all claims arising under or by virtue of said contract.

Original contract	$1,123,000.00
Net addition (C. O. 1–60)	17,782.25
Final Contract Price	1,140,782.25

6. In accordance with practice, the Architect of the Capitol forwarded the final voucher and the release to the Comptroller General for settlement. The certificate of settlement issued by the General Accounting Office deducted

the sum of $900.00 from the amount approved by the Architect of the Capitol, the Comptroller General ruling that liquidated damages should be assessed under Article 9 of the contract for nine days' delay due to a controversy as to the prevailing rate of wages. The Architect of the Capitol had found as a fact that plaintiff's operations were delayed "from December 30, 1933, to January 7, 1934, inclusive, a period of 9 calendar days," and included this period of time in the 272 days' extension of time allowed by him in waiving all delays. A Treasury check in the sum of $58,382.25, the amount of plaintiff's final requisition as shown in finding 5, less $900, was issued to plaintiff.

On May 29, 1934, a firm of attorneys addressed a letter to the Comptroller General, stating:

> We represent the United States Fidelity & Guaranty Company and Jacobson Brothers Company in the matter of the contract between the latter and the United States for the construction of an addition to the Library of Congress, Washington, D. C., under contract No. AC-cong.-70, dated March 31, 1932.
>
> There has been received by the United States Fidelity & Guaranty Company notice of settlement of claim under said contract, being certificate No. 0327832—claim No. 0447134, together with check for $58,382.25, payable to the order of Jacobson Brothers Company c/o Mr. George W. Hynson, Treasurer United States Fidelity and Guaranty Company, Calvert and Redwood Streets, Baltimore, Maryland, which check purports to be in final settlement of said contract.
>
> Our clients are desirous of receiving the proceeds of this check, as there are numerous claims outstanding for labor and materials, upon which demands are constantly being made. We are informed, however, that there are possible claims against the United States for damages incurred by the contractor during prosecution of the work. It is, therefore, important from the standpoint of our clients that they refrain from being put in a position of releasing these claims by using the check.
>
> We accordingly request that you authorize our client to use this check upon the understanding and condition that by cashing it they do not waive any rights against the United States, but specifically reserve any and all rights now held by them to prosecute any lawful claim

before any Department having jurisdiction, or in the Court of Claims.

In acknowledging the receipt of this letter the Comptroller General said:

> The jurisdiction—administratively as contrasted with judicial—is in this office, as provided in the Budget and Accounting Act of June 10, 1921, 42 Stat. 24, to settle claims arising under the contract, and so far as this office is concerned the check for $58,382.25 may be accepted without prejudice to further consideration here of any legal claims which the contractor may present under the terms of the contract. This office cannot inform you as to what effect the acceptance of the check might have in any proceedings in the Court of Claims.

The check was thereafter cashed.

7. The change orders enumerated in Finding 4 as a rule followed negotiations between the parties—a request by the contracting officer to plaintiff for a proposal covering the extra work, the changed work, or the omission of work, as the case might be; and a proposal by plaintiff describing the work and the proposed addition to or deduction from the contract price. The change orders in many instances were issued after the work called for therein was already accomplished. The additions to the contract price were, in general, except where unit prices named in the contract were used, based upon cost plus ten percent thereof for overhead, plus ten percent of the aggregate of cost and overhead for profit.

Change Order No. 23, covering structural steel lintels over two windows, specifically increased the contract time by 6 calendar days. No other change order specifically increased the contract time.

Details in connection with other change orders are hereinafter set forth.

8. The construction called for by the contract was an addition to the Library of Congress, Washington, D. C., wall-bearing, and projecting from the east side of the main building. The addition was designed to conform as closely as possible to the main structure, which was considered unique

in public buildings in the United States, due to painstaking craftsmanship in the original structure, and was known as a "hand-tailored" job. The task of conforming the addition to the main structure required a high degree of care and attention upon the part of architect, owner, and builder, and step-by-step progress not present in ordinary modern building construction.

9. *Soil conditions and underpinning.*—The first work under the contract involved demolishing a portion of the existing structure and excavating for the addition. The defendant had made no investigation of soil conditions prior to letting the work. The contract specifications, Article 6 of Section IV, provided the bottoms of all excavations should be at the exact level indicated unless greater depth was required by reason of unsuitable bearing conditions, that all soil-bearing footings or walls should be started only upon approved bearing soil, and that if greater excavation was required than shown or reasonably indicated such excess excavation would be the subject of adjustment of the contract sum on the basis of unit prices mentioned in the contract for the various items.

On July 26, 1932, after plaintiff had excavated for footings and was ready to start pouring concrete, the defendant ordered pouring suspended until soil conditions could be investigated. The pouring was suspended, the soil was examined and tested by the defendant, and on August 8, 1932, pouring was ordered to begin again.

Plaintiff applied to the contracting officer on August 8, 1932, for an extension of 13 days in the contract time to cover the period of suspension. September 7, 1932, the contracting officer by letter acknowledged receipt of the application and stated that the delay of 13 calendar days had been noted and that consideration would be given at the time of final settlement to the waiver of liquidated damages for a corresponding period of time.

Necessary extension of footings was done by plaintiff and paid for under Change Order No. 36, dated June 29, 1933. The price paid was based upon either actual cost or the unit prices for excavation specified in the contract, where applicable.

At the time of final settlement, the contracting officer allowed an extension of time of 13 days on account of soil conditions.

Except for the pouring of the completed footings and walls, the suspension order did not interfere with the work. The demolition work was not completed until some time in September.

No underpinning for the existing building had been originally specified. After excavation was begun, the defendant determined that additional underpinning would be necessary. August 3, 1932, when plaintiff reached the level of the bottom of the existing footings, it was directed not to proceed until the nature and extent of additional underpinning was determined.

The underpinning was in consequence postponed from August 5, 1932, to September 1, 1932, 27 days. Plaintiff applied for a corresponding extension of time, but was refused such extension by the contracting officer September 9, 1932, on the ground that it was concurrent with other delays.

Thereafter, October 3, 1932, plaintiff protested that it was entitled to an extension of time covering the period involved in the actual operations of underpinning and pursuant to a suggestion of the contracting officer formally made application October 18, 1932, after cost of the work was ascertained, for an extension of 56 calendar days, from August 5, 1932, to September 29, 1932.

The contracting officer replied October 31, 1932, to this request stating that of this period 22 days only, September 8, 1932, to September 29, 1932, were not concurrent with other recognized delays, that the 22 days were "recognized on account of the additional work required in connection with the underpinning," that due note had been made of "this additional delay," and that at the time of final settlement consideration would be given if necessary to the waiver of liquidated damages over a corresponding period.

The extra work required by the underpinning was paid for under Change Order No. 7 of October 31, 1932. At the time of final settlement the contracting officer allowed plaintiff a time extension of 22 days on account of work relating to underpinning, which time was not concurrent with other

recognized delays during the period from August 5, 1932, to September 29, 1932.

10. *Consideration of granite samples.*—The exterior walls of the old building were composed of Concord granite.

The specifications, Article 2 of Section IX, provided that such of the old granite as was removed in demolition from the main building might be used in the new work if it was in good condition and could be recut, redressed and cleaned to correspond in color, shade, and texture to the approved new granite the contractor proposed using, and Article 5 of the same section provided that all new granite should be hard, durable gray granite having the same color, shade, and texture as the old granite after it had been thoroughly cleaned. Under Article 9 of Section I a sample of granite was required to be submitted by the successful bidder to the Architect of the Capitol, 24 inches by 24 inches of each finish. The plaintiff submitted four samples of Stone Mountain, Georgia, granite April 12, 1932, requesting an early decision. No formal action was taken by the Architect on this submission. On May 7, 1932, plaintiff submitted three samples of Concord-New Hampshire granite, following a suggestion from the Architect that the Stone Mountain granite would not be accepted. Again following a suggestion from the Architect that he did not wish to be put to the election between two samples, plaintiff, May 19, 1932, withdrew the sample of Stone Mountain granite. The Architect approved the samples of Concord-New Hampshire granite May 23, 1932, as well as the proposed subcontractor for the granite work, John Clark Co. Inc., of Rockville, Minn. On May 31, 1932, plaintiff gave the Architect notice that although it did not anticipate a delay by reason of the lapse of time between submission and approval of granite, it was desired to record the dates thereof in the event that delay attributable to the elapsed time thereafter developed.

On September 27, 1933, plaintiff applied to the Architect for an extension of 26 calendar days for performance, covering the period April 12, 1932, to May 7, 1932.

On October 26, 1933, the contracting officer wrote plaintiff a letter containing the following:

Because of the failure of this office to take action on the Stone Mountain granite, it is considered that the Government delayed your operations for a period of 25 calendar days from April 13, 1932, to May 7, 1932, inclusive, and at time of final settlement, consideration will be given to the waiver of liquidated damages over a corresponding period.

A reasonable time for consideration of the granite samples was ten days from the date of their submission.

11. *Changes in bookstack design.*—A part of plaintiff's work was furnishing and installing steel bookstacks. The bookstack construction was unusual in that the bookstacks were a structural part of the building, supported by the walls and carrying the roof construction.

For bookstack construction and book ranges plaintiff submitted to the contracting officer the name of Union Iron Works Co., as subcontractor April 19, 1932. This company was approved as a subcontractor July 1, 1932. On July 9, 1932, plaintiff notified the contracting officer of the possibility of delay in the work attributable to the period between April 19, 1932, and July 1, 1932.

The Architect revised the details of the bookstack construction and on August 4, 1932, requested plaintiff to submit a proposal covering the revision. This plaintiff did August 25, 1932, after having submitted an earlier proposal that was rejected. The revised proposal stated that, due to the fact that the bookstack subcontractors had been unable to proceed with fabrication because of the Government's delay in redesigning the bookstacks, an extension in contract time should be granted "equivalent to the elapsed time between the suspension of the bookstack detailing and your final decision in the matter." The proposal was accepted by Change Order No. 5 of September 7, 1932, which was silent as to extension of time for performance.

Thereafter, September 9, 1932, the contracting officer found and so notified plaintiff that the bookstack subcontractor was on or about July 1, 1932, notified by the consulting architects not to proceed with the shop drawings as a change in design was contemplated; that the change in design was authorized September 7, 1932; that plaintiff was accordingly delayed for

a period from July 1, 1932, to September 7, 1932, inclusive, a total period of 69 calendar days; and that a concurrent delay of 13 calendar days from July 26, 1932, to August 8, 1932, had been recognized by the contracting officer, leaving an additional delay due to suspension of the bookstack detailing of 56 calendar days, due note of which had been made for the purpose of consideration in final settlement with a view to waiver of liquidated damages over a corresponding period.

Because of their unusual construction, the installation of the bookstacks could not be started until the erection of the walls reached the second floor level. This stage of construction was reached and the erection of the bookstacks begun in March 1933, although the materials began arriving in October 1932.

12. *Changes in cellar.*—During the course of the work the Architect of the Capitol considered changing the refrigeration layout and other things in the cellar. February 24, 1933, plaintiff was ordered to and did suspend certain work in the cellar until the change in arrangement could be worked out. On April 12, 1933, the contracting officer requested plaintiff to submit a proposal making the change, which proposal plaintiff furnished May 19, 1933. June 6, 1933, plaintiff requested an extension of 30 days to cover the change. The change order, No. 37, under which payment for the change was made, was issued July 1, 1933, without providing for an extension of time. On September 8, 1933, the contracting officer found, and so notified plaintiff, that plaintiff was directed to suspend the work in question in the cellar February 24, 1933, pending decision on changes; that the changes were ordered July 1, 1933; that by reason of the time taken by the Government to consider the change the plaintiff was delayed in the prosecution of the contract work 30 calendar days, falling within the period between February 24, 1933, and July 1, 1933. The finding so made concluded with the statement that at the time of final settlement consideration would be given if necessary to waiver of liquidated damages over a period of 30 calendar days.

13. *Additional flashing.*—On June 15, 1933, the contracting officer requested of plaintiff a proposal for furnishing and installing certain lead-coated copper flashing not called

for by the original contract. The proposal was furnished June 16, 1933, with a request for two days' extension of time. July 13, 1933, the contracting officer responded to the request for extension of time by notifying plaintiff that the "work was held up on June 13th and June 14th, 1933, while this change was being considered," and that plaintiff was thereby delayed for a period of two calendar days. The contracting officer concluded the letter of notification by stating: "Due note has been made of this delay and at time of final settlement the question of waiver of liquidated damages over a corresponding period will be given consideration."

Change Order No. 38 was issued July 14, 1933, without mention of any extension of time, and the work covered thereby was duly paid for.

14. *Changes in air ducts.*—On July 29, 1932, the contracting officer issued his Change Order No. 1 covering a change in the lighting schemes in the Card Index and Union Catalogue Rooms. The details were shown on drawing M–5 (a), prepared by the Architect, which was referred to and which contained a note to the effect that the work affected by the change was wiring, plastering, and cabinet work. The plaintiff did not give a copy of this drawing to the subcontractor for installation of the air ducts in the ceiling of the Union Catalogue Room, whose work also was affected by the change. The subcontractor for installation of the air ducts accordingly installed them as indicated by the original plans and drawings and after they were installed it was discovered that they ran through spaces assigned by the plans to luminaries that were to be recessed in the ceiling.

Plaintiff claimed actual cost, plus 10% for overhead and 10% for profit, for doing the extra work described in this finding. A compromise agreement was worked out whereby plaintiff was to receive only actual cost, since its failure to coordinate related work and check and verify the plans and drawings had caused the additional work.

Accordingly, plaintiff on February 19, 1934, submitted a proposal to the contracting officer for rerouting the air ducts at cost only, not including overhead or profit, in the sum of $467.45 and Change Order No. 60 was issued thereon February 23, 1934, for that amount and ultimately paid. The

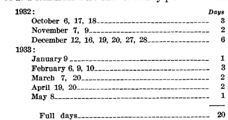
change order made no provision for extension of time. The proposal requested such an extension covering August 7 to August 31, 1933, or 25 calendar days, for the work of rerouting. At the time of final settlement all delays were waived by the Architect of the Capitol, at which time he considered and gave effect to the 25-day time extension requested by the plaintiff on account of this item of work.

15. *Change in painting, Rare Book Reading Room.*—On January 18, 1934, the contracting officer requested plaintiff to submit a proposal for changing the painting of the plaster sidewalls, panels, frieze and cornices of the Rare Book Reading Room and Exhibition Hall to an enamel finish and for doing certain other painting in addition to that specified in the original contract. The plaintiff furnished this proposal January 24, 1934, and on account of the change in the Rare Book Reading Room and Exhibition Hall and suspension of work therein for consideration of the change by the consulting architects, requested in the proposal an extension of 11 days for performance of the contract. On January 30, 1934, change order No. 58 was issued, embodying the proposal and stating, in connection with the change in the Rare Book Reading Room and Exhibition Hall: "* * * you were delayed 7 calendar days from January 11, 1934, to January 17, 1934, inclusive, while the change was under consideration, and it is considered that the work ordered required 4 calendar days more to perform than the work contemplated by the contract. Accordingly, at time of final settlement consideration will be given to the waiver of liquidated damages for a period of 11 calendar days, on account of this change." Payment has been made of the price stated in the order.

Item 1 of the change order related to the changes in the Rare Book Reading Room. Items 2, 3, and 4 related to painting in the basement and corridors which was not required by the contract and which had been performed months before the change order was issued on January 30, 1934. The defendant determined that the work would have been required, and it was paid for in accordance with plaintiff's proposal of January 24, 1934. The 11 days' time extension requested by the plaintiff was included as a part

of the 272 days' time extension allowed by the Architect of the Capitol in waiving all delays at the time of final settlement.

16. *Delays due to nature of weather.*—Progress on the work was at times retarded by inclement weather, and from time to time plaintiff applied to the contracting officer for extensions of time due to weather conditions. The days on which progress on the exterior of the building was claimed to be at a standstill were enumerated by plaintiff as follows:



	Days
1932:	
October 6, 17, 18	3
November 7, 9	2
December 12, 16, 19, 20, 27, 28	6
1933:	
January 9	1
February 6, 9, 10	3
March 7, 20	2
April 19, 20	2
May 8	1
Full days	20

The days on which such progress was claimed to be merely slowed up were enumerated as follows:

	Days
1933:	
January 25	1
February 1, 7, 13, 20, 27	5
March 13, 21, 23	3
April 6, 12	2
May 16	1
Total	12

The plaintiff calculated the time so lost as amounting to 36 calendar days and in an application to the contracting officer August 11, 1933, for extension of contract time by 36 calendar days, claimed that delays arising by reason of changes in the contract work, ordered by the contracting officer, had thrown much of the outside work that otherwise would have been completed in summer and fall, into the winter months, in which progress was slower.

The contracting officer informed the plaintiff that the facts in regard to delay resulting from inclement weather would receive consideration at the completion of the project

when it could be determined what effect the weather had upon the date of completion.

At the time of final settlement the Architect of the Capitol waived all delays. In granting time extensions aggregating 272 days, he included as a part thereof 26 days claimed by the plaintiff on account of unfavorable weather conditions, and 10 additional days on account of Sundays and holidays, or a total of 36 days.

Because of the delays in the early part of the work, certain work that otherwise would have been done in summer or fall was done in the winter, and certain work that would otherwise have been done in winter was done in the spring or summer. There is no satisfactory proof of the net increase of cost to plaintiff, due to this shift in the work.

17. *Addition of lintels.*—On April 8, 1933, the contracting officer issued Change Order No. 23 in the sum of $238.52, as proposed by the plaintiff, for the installation of certain structural steel lintels over two of the windows, not provided for in the original contract, and in the order stated: "In view of the time consumed in making this change, the contract time is hereby increased by 6 calendar days." Plaintiff's proposal made no request for extension of contract time but at the time the proposal was made the plaintiff in a separate communication to the contracting officer referred to the proposal and requested an extension of 6 days, on the ground that progress on the exterior of the building was at a standstill March 2, 1933, to March 8, 1933, when the revision involving the additional work was being determined. The increase in price provided for in the change order was eventually paid.

From March 2 to March 8, 1933, stone setting and other operations continued without interruption. The material for the changed work was obtained from Philadelphia, but the actual work was completed in about one day.

The 6-day period included a Saturday and Sunday, on which days no work relating to the setting of stone was performed. At the time of final settlement the contracting officer waived all delays and granted time extensions totaling 272 days including the 6 days requested by the plaintiff on account of this item of work.

18. *Plasterers' and lathers' strike.*—In June of 1933, at the time the work was ready for lathing and plastering, the plaintiff's sub-contractor for lathing and plastering was having difficulty with his lathers and plasterers who belonged to a union and were striking. The plaintiff refrained from the substitution of non-union men on the job for fear that it would result in labor disturbances in other work on the building. The plaintiff kept the contracting officer informed as to the situation. When the lathers and plasterers finally reported to the site for work a jurisdictional dispute arose between them and the structural steel workers, which was not settled until July 26, 1933. On September 8, 1933, the contracting officer made the following findings of facts relative to the situation in response to a request by plaintiff for an extension of 34 days, and transmitted them to plaintiff:

> Reference is made to your letters of July 28th and August 28th, 1933, relative to delay encountered by your firm in the execution of the above contract on account of labor troubles by your sub-contractor for plastering and lathing.
>
> It appears that you were ready to begin the plastering work on June 22, 1933, but that on account of difficulties between the Master Plasterers and the Local Plasterers' Union you were unable to secure mechanics for the work and that these labor difficulties were not settled until July 13, 1933, and that when the mechanics finally were obtained, a new dispute arose in connection with the installation of the special steel framework for the suspended ceiling in the basement corridor, which had been installed by structural steel workers. This dispute was not settled until July 24, 1933, and you were finally able to start the work on the morning of July 26, 1933.
>
> In view of the above facts, you were delayed in the execution of your contract for the period from June 22, 1933, to July 25, 1933, inclusive, a period of 34 calendar days. This office is of the opinion that this delay comes under the category of those specifically mentioned in Article 9 of the contract, and that accordingly at time of final settlement, consideration will be given, if necessary, to the waiver of liquidated damages over a period corresponding to that during which the delay in question occurred.

Work continued without interruption in other parts of the project during the 34-day period between June 22 to July 25, 1933.

At the time of final settlement the Architect of the Capitol included this 34-day period as a part of the 272 days' time extension allowed by him in waiving all delays under the contract.

19. *Painters' strike.*—During the progress of the work a strike of the painters occurred over a question of wages. Plaintiff applied for an extension of seven days due to the strike; the contracting officer found the facts to be as follows, and so informed plaintiff January 29, 1934:

> Reference is made to your letter of January 17, 1934, relative to delay in the execution of the above contract on account of painters' strike.
>
> It appears that because of a controversy as to the prevailing wage scale, which had to be submitted to the Department of Labor for settlement, the painters were withdrawn from the work on the afternoon of December 29, 1933, and that they did not return to work until the morning of January 8, 1934. It is accordingly considered that your operations were delayed from December 30, 1933, to January 7, 1934, inclusive, a period of 9 calendar days. At time of final settlement of the contract, consideration will be given to the waiver of liquidated damages over a corresponding period.

20. *Granite workers' strike.*—During the progress of the work there were strikes of stonecutters and setters of short duration. The plaintiff applied for an extension of time of three days to cover the strike period and on September 8, 1933, the contracting officer found, and so informed plaintiff, that he considered that the plaintiff had been delayed three days, and that at the time of final settlement consideration would be given, if necessary, to waiver of liquidated damages over a corresponding period.

During the 3-day period involved, namely, April 3 and 5, 1933, and May 22, 1933, all other work continued except stone-setting and related operations.

At the time of final settlement, this 3-day time extension was included as a part of the 272 days' time extension allowed

by the contracting officer in waiving all delays under the contract.

21. After the completion and acceptance of the contract work and following a conference with the plaintiff, the Architect of the Capitol advised plaintiff in writing that he had approved the final voucher for payment of the full amount requested by it. After the plaintiff executed a final release as provided for by Art. 16 (d) of the contract, the voucher was forwarded to the Comptroller General, in accordance with established practice, for final settlement. In waiving all delays under the contract the Architect of the Capitol granted time extensions totaling 272 days.

Of the 13 causes of delay which had been asserted by plaintiff during the course of the work, 8 had to do with changed work covered by change orders; the remainder were delay in approval of the granite samples, and delay due to unfavorable weather conditions and the three strikes.

22. In erecting the addition to the Library plaintiff's subcontractor for the granite planned to use such of the granite blocks in the demolished wall of the main building as were suitable or could be made suitable for use again. This plan effected economy in the cost of the addition which was reflected in plaintiff's bid. The major part of the addition was made of newly quarried granite obtained from the same quarry as the original granite.

Fabrication of the granite blocks was not done at the quarry. Fabricating plants near the quarry or at distant points were employed by plaintiff or its subcontractors to shape the stone to conform to the plans or drawings.

The fabricated stone was not all delivered to the site in Washington in the sequence required either by the actual or contemplated progress of the job.

If enough stone was finished at the fabricating plant to make a reasonable shipment it was consigned to the Washington site before it was needed. Required sizes and shapes were not uniform, due to the "hand-tailored" nature of the building and in consequence of this and for other reasons blocks were not always produced in the order of their setting. It was advantageous to the plaintiff and its

subcontractor to effect early delivery at the site, regardless of the sequence of setting, owing to the fact that it was the practice of the contracting officer, as authorized by Article 16 of the contract, to make partial payments during the progress of the work based in part upon the material delivered on the site.

Granite setting operations did not begin until November 11, 1932. Some of the pieces of granite for the lower or base courses were not delivered to the site until late December of 1932 and January of 1933. The granite subcontractor did not know definitely how much of the salvaged stone he could use until March 1933. This delayed the placing of orders for new stone.

On some occasions, defective pieces of granite were installed, which had to be removed and replaced by proper pieces.

The work of setting granite took longer than plaintiff and its subcontractor had anticipated and the delay in getting into full operation threw some of the setting which would have been done in mild weather into winter weather, increasing the cost of the work. The amount of this increase in cost and the extent of the defendant's responsibility therefor have not been satisfactorily proved.

Based on the estimated value of granite installed, as certified by plaintiff and approved by the contracting officer, there had been accomplished at the end of December 1932, at which time the contractor had planned to complete the granite work, 56% of the installation, in January and February of 1933 an additional 19%, in March and April of 1933, another additional 19%, the remaining 6% extending therefrom to some time in November of 1933.

23. In a wall-bearing type of building such as the addition to the Library of Congress delay in one structural feature delays the other structural features.

The structural concrete work, including fills and finishes, was sublet by plaintiff and its progress depended upon the progress of other structural work. The structural concrete could not be poured until the granite in the walls was set.

Plaintiff's contemplated progress schedule indicated that the structural concrete work proper was to be done in June,

July, August, and September of 1932, and the fills and finishes in January of 1933. This schedule was in error, and the structural concrete, under the original plan, would not have been completed before December 1, 1932. By reason of delays or other work, the placing of concrete was forced into the winter months. The structural concrete was finally completed in August of 1933, shortly before substantial completion of the granite work, and the fills and finishes were completed December 6, 1933. The doing of the concrete work in the winter months entailed such extra expenses as heating of the concrete, deterioration of forms due to wet weather, reduced efficiency of labor due to low temperatures, a general stretching-out of the period of performance and increase in price of materials.

The structural concrete subcontractor presented no written claim to plaintiff nor to the surety for any additional expense relating to the performance of the work. Plaintiff did not set up such a claim as a liability upon its books. Plaintiff offered proof that its subcontractor verbally presented a claim for $5,633.06. Neither plaintiff's loss in this regard nor the defendant's responsibility for such loss has been satisfactorily proved.

24. The granite walls of the addition were backed with brick. The granite walls and their brick backing had to rise together, and delay in setting the granite walls necessarily delayed laying of brick backing. Neither damage to plaintiff by reason of delay in laying of brick backing nor the defendant's responsibility therefor has been proved.

25. Plaintiff sublet the work of plumbing. This trade necessarily followed other trades, and when other trades were delayed installation of the plumbing also was delayed. There is no evidence that the plumbing was not installed promptly when the work was advanced to a point where it could be installed.

There is no satisfactory proof that plaintiff was damaged by any act of the Government relating to the item of plumbing.

26. Several of plaintiff's subcontractors were involved in financial difficulties during the course of the contract and it became necessary for plaintiff, in some instances, to take

over and complete their work under the contract. Plaintiff's surety effected settlements with many of the subcontractors after the work was completed and accepted by the defendant.

Early in December 1933, plaintiff advised the Architect of the Capitol that it was in financial difficulties and that certain of its subcontractors had refused to deliver materials unless cash payments were made in advance of delivery; that it had exhausted its working capital and credit and was unable to meet its immediate demands, and that it might be unable to complete the work. The Architect, with the consent of plaintiff's surety authorized the release and payment to plaintiff of a part of the retained percentages, amounting to $30,000. On February 26, 1934, plaintiff executed a power of attorney, whereby it authorized its surety to receive and collect the balance of all moneys due and payable under the contract. The extent to which plaintiff's financial difficulties were a cause of delay has not been proved.

27. Plaintiff's job overhead for the period of actual construction averaged $40.35 per calendar day.

Plaintiff's general office overhead for the period of actual construction applicable to the job in suit, averaged $65.11 per calendar day, a combined overhead of $105.46 per calendar day.

At no time was there a cessation by plaintiff of all work at the site.

The court decided that the plaintiff was entitled to recover only the amount deducted by the Comptroller General, $900, as to which there was no contention on the part of the defendant.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff was on March 31, 1932, awarded the contract for the construction of an addition to the Library of Congress. The price was $1,230,000. Plaintiff agreed to complete the work within 400 days from receipt of notice to proceed, and to pay $100 per day as liquidated damages for delay beyond the agreed period unless the cause of the delay

was one listed in the contract as being excusable. The work was completed February 14, 1934, 272 days after the agreed date.

The defendant's contracting officer was told by plaintiff after the completion of the work that plaintiff was making no claims against the defendant based on any supposed breaches of the contract on the defendant's part. In view of that fact, and of other considerations recited in finding 5, the contracting officer decided that it would be equitable to grant plaintiff extensions of time aggregating 272 days, thus wiping out any liability on plaintiff's part for liquidated damages.

Article 16 (d) of the contract is as follows:

> Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

On February 23, 1934, nine days after completion of the work, plaintiff submitted a requisition for $59,282.25, the balance of the contract price then remaining unpaid. On March 23, the contracting officer advised plaintiff by letter that a voucher for the amount of plaintiff's requisition had been approved by him; that pursuant to the above quoted Article 16 (d) of the contract he was enclosing two copies of a release which plaintiff had agreed to give; that upon receipt of the release executed by plaintiff he would forward the voucher to the General Accounting Office for consideration and final settlement. The letter contained this statement:

> It is of course understood that, although this office has certified the final payment voucher in the full amount requested by your company, the matter of actual assessment or waiving of liquidated damages which may have accrued for periods of delay in the completion of your contract is one that is beyond the

jurisdiction of this office, such authority being, instead, vested by law in the Comptroller General of the United States.

Plaintiff on April 16 returned the two copies of the release to the contracting officer. The release was complete and contained no exceptions. The contracting officer then forwarded the voucher approved by him, and the release to the General Accounting Office for settlement. The Comptroller General issued a certificate of settlement for the amount of the voucher, less $900.00 which, he ruled, should be deducted for liquidated damages for nine days' delay resulting from a controversy concerning the prevailing rate of wages. Pursuant to the certificate, a Treasury check was forwarded to plaintiff. A firm of lawyers representing plaintiff and its surety on the contract bond wrote the Comptroller General that the check purported to be in final settlement of the contract; that plaintiff desired to cash the check if by doing so it would not prejudice plaintiff's "possible claims against the United States for damages incurred by the Contractor during prosecution of the work." The relevant part of the Comptroller General's reply is quoted in finding 6. Plaintiff thereupon cashed the check.

On May 11, 1935, plaintiff filed its suit in this court for $100,253.36, $900.00 of which is the amount of liquidated damages assessed against it by the Comptroller General, the rest being alleged damages resulting from delays in carrying out its contract which, plaintiff says, the defendant wrongfully caused. The defendant concedes plaintiff's right to the $900.00. As to the rest, it sets up plaintiff's release as a defense, and also contends that it did not wrongfully cause plaintiff any delay.

We think the defendant's contention as to the release is well-founded. Plaintiff agreed, in its contract, that when the work was completed and payment of the balance due under the contract was called for, it would, if required to do so, give the Government a release of all claims except those specifically excepted in the release. The fairness and prudence of the provision is well illustrated by this case. As to some of the many periods of delay, the contracting officer

had a considerable area of discretion as to whether or not he would grant extensions of time and thereby forego the assessment of liquidated damages. He was induced, in part by plaintiff's oral statement that it was making no claims of breach of contract by the Government, to exercise that discretion favorably to plaintiff. Plaintiff then executed the release which it had agreed to give. It could have made exceptions from the release, but it did not. Thereupon the contracting officer finally committed himself to the recommendation that no liquidated damages for delay be assessed against plaintiff. Plaintiff received payment accordingly, except for $900.00 as to which we comment hereinafter. Plaintiff then at its leisure, and with the money received pursuant to the release in its hands, repudiated the release, sued the Government for a large sum, and is using the contracting officer's recommendation as an admission that plaintiff was without fault in relation to the delays.

We think the contract bound plaintiff to give a release which would be effective except as specific matters were reserved for further claim or litigation. We therefore hold that the release given had that effect. The deduction of $900.00 by the Comptroller General did not destroy the effect of the release. The contracting officer stated to plaintiff in his letter hereinbefore quoted, transmitting the releases for plaintiff's signature, that jurisdiction to assess or waive liquidated damages was not in his hands. Plaintiff had no reason to suppose that its release of all claims other than the requisition for the unpaid balance, was conditioned upon its getting the full amount of its requisition. When the $900.00 was deducted, plaintiff made no complaint as to that. It only requested that the cashing of the check should not prevent it from pressing claims for damages. The Comptroller General did not purport to, and we suppose he would have no power to, destroy the effect of the release as a defense to a suit against the Government on a validly released claim.

In view of our conclusion as to the effect of plaintiff's release, we do not find it necessary to consider or determine whether plaintiff has proved, with sufficient definiteness to justify a recovery, damages to it resulting from delays

wrongfully caused by the defendant, nor the extent of such delays.

Judgment will be entered for plaintiff in the sum of $900.00. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MAURICE C. PIERCE v. THE UNITED STATES

[No. 43860. Decided October 5, 1942. Plaintiff's motion for new trial overruled February 1, 1943]

On the Proofs

Suit for salary where employment was terminated on charges and after hearing; act of February 23, 1931.—Where plaintiff, a Foreign Service Officer, was separated from the service and removed from his office as of March 31, 1932, by order of the Secretary of State, upon reports of inefficiency and unsatisfactory service supported by proper showing, and after hearing; and where upon appeal to the President the action of the Secretary of State was confirmed; and where in removing plaintiff from office the State Department acted in full compliance with the regulations of the State Department and the act of February 23, 1931 (22 U. S. C. 23); it is *held* that plaintiff's removal was legal and he is accordingly not entitled to recover salary after March 31, 1932.

Same; probationary assignment.—Where the action of the Secretary of State on March 16, 1932, removing plaintiff from office, was the culmination of proceedings taken by the Secretary under and in conformity with the regulations and procedure in force before the act of February 23, 1931, was approved; and where such regulations and procedure, as well as the proceedings had by the State Department on plaintiff's record, complied with and conformed to the procedure set forth in section 33 of said Act, and where the Personnel Board of said Department had found plaintiff's record to be unsatisfactory after having granted plaintiff a hearing thereon; it is *held* that the fact plaintiff was thereafter given a probationary assignment in order to afford him an opportunity to overcome his unsatisfactory record, in which he failed, did not require the Secretary of State or the President to make further charges and grant plaintiff a further hearing.

Same; jurisdiction.—A suit to recover salary for removal from office contrary to and in violation of a law of Congress is within the jurisdiction of the Court of Claims under section 145 of the Judicial Code, Title 28, U. S. C., section 250. *Richardson* v. *United States*, 64 C. Cls. 233, and other cases cited.

Same; laches.—The defense of laches is applicable to such a suit.

Same.—Where the action of the proper Government officials in the removal from office of a claimant is shown to have conformed to and complied with the statute and applicable regulations their action is not subject to review by the Court of Claims.

The Reporter's statement of the case:

Mr. Maurice C. Pierce, pro se.

Mr. Grover C. Sherrod, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant. *Mr. Rawlings Ragland* was on the brief.

Plaintiff brings this suit to recover the salary of a Foreign Service Officer, Class VII, in the State Department from March 31, 1932, which was the date on which his removal from office by the Secretary of State, subsequently approved by the President, was made effective, on the ground that his removal was illegal and void for the alleged reason that charges were not preferred against him and he was not given notice and opportunity to be heard, as required by section 33 of the Act of February 23, 1931 (22 U. S. C. 23 (i)), and Art. II, section 44, of the Consular Regulations and Executive Order of June 8, 1931.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Madison, Wisconsin. He was employed by the defendant as a vice consul and clerk at Barmen, Germany, March 4, 1914. This was a noncareer position calling for the performance of clerical duties only. After serving a brief period plaintiff was dismissed by the consul October 27, 1914. In 1915 plaintiff was reemployed as a clerk and assigned to Zurich, but after a few months resigned and returned to the United States. He was in the foreign service of the United States as a Foreign Service officer from 1917 until he was involuntarily separated from the foreign service, effective as of March 31, 1932, as hereinafter mentioned.

2. After passing an examination before the Board of Foreign Service of the State Department, plaintiff was on September 14, 1917, appointed by the President of the United

States, with the advice and consent of the Senate, as Consul of Class VIII of the United States. On July 1, 1924, the President, with the advice and consent of the Senate, appointed plaintiff a Foreign Service Officer, Class VII of the United States, to hold and exercise said office, during the pleasure of the President, and until the end of the next Session of the Senate, and no longer. Thereafter, on December 20, 1924, the President, with the advice and consent of the Senate, appointed plaintiff a Foreign Service Officer, Class VII of the United States, to hold and exercise said office during the pleasure of the President of the United States. As Consul of Class VIII and thereafter as Foreign Service Officer, Class VII, plaintiff was assigned to and served at Helzingborg, Malmo, Archangel, Murmansk, Christiania, Malmo (second assignment), London, Bergen, Stuttgart, and St. John, New Brunswick.

Plaintiff served as consul at London from August 25, 1921, until he was assigned as consul at Bergen, Norway, January 22, 1924, where he served until February 13, 1930.

3. Throughout plaintiff's service at the various posts, unfavorable reports regarding his official work and his personal conduct were made by his superiors to the State Department, and complaints were also made by private individuals. In an annual efficiency report to the State Department, dated August 1, 1929, the Consul General at Oslo, Norway, on the basis of close observation of plaintiff's work and on the basis of numerous unfavorable reports made to him regarding plaintiff, expressed the opinion that plaintiff should be removed to some other post. Subsequently, on February 7, 1930, a letter, set forth in full on sheet 7 of the defendant's exhibit A, which is made a part hereof by reference, was received by the State Department from a Norwegian woman at Bergen, Norway. February 13, 1930, plaintiff was transferred to Stuttgart, and on August 15, 1930, the Consul General at Stuttgart reported to the State Department that plaintiff was incompetent, careless, inefficient, utterly oblivious to duty, and useless at Stuttgart. This report was as follows:

> After about six months of daily contact with this officer the only impression I have is that formed after

> the first weeks of his arrival, namely, amazement that so much incompetence, carelessness, inefficiency, and utter oblivion to duty should all be concentrated in a single individual. Never in all my life have I come in contact with anybody so worthless and so lazy.
>
> He is so incompetent that I have been obliged to instruct him to discuss with me the most elementary cases coming before him in order that he might be told how to take proper action. * * *
>
> Socially his manners are coarse and he is rough by inclination. * * *
>
> He is useless at Stuttgart and has the impertinence to tell me that he was sent here from Bergen because he asked to be transferred to a post where he could play golf.

Thereafter the State Department ordered that plaintiff be transferred from Stuttgart and assigned to Buenaventura, Colombia.

4. After his services were terminated at Stuttgart plaintiff returned to Washington and protested to the State Department his assignment to Buenaventura. In this connection he sought the assistance of two senators who communicated with the State Department about the matter. January 21, 1931, the State Department in writing directed plaintiff to appear before the Foreign Service Personnel Board on January 22, 1931, at 3 p. m. Plaintiff appeared, was fully informed relative to his unsatisfactory record and of the charges and complaints that had been made against him and was given an opportunity to be heard, and was heard with respect thereto. Plaintiff's unsatisfactory record and the charges which had been made against him were discussed between plaintiff and the Board. As a result of this hearing plaintiff did not satisfactorily meet the charges. The Board found that plaintiff's official and personal record was unsatisfactory, but it concluded by reason of a request on behalf of plaintiff, to afford him one more opportunity to improve his unsatisfactory record and to demonstrate, if he could, to the personnel board and the Secretary of State his fitness to be a Foreign Service officer. As a result, plaintiff was given an assignment, probationary in character, to St. John, New Brunswick, Canada, conditioned upon his measuring up to the requirements of a Foreign Service officer. Accordingly,

on January 26, 1931, the assignment to Buenaventura was canceled and plaintiff was assigned as consul to St. John. In that assignment he utterly failed to fulfill the opportunity afforded him. After a year at St. John, complaints reached the State Department in regard to plaintiff's official and personal conduct and the State Department made an investigation which showed that during his assignment there the plaintiff had consistently neglected his duty; that he had no standing whatever in the community; and that his official and personal conduct had been such as to discredit the Government.

5. March 9, 1932, plaintiff's entire record in the Foreign Service was reviewed in a report by the Chief of the Division of Foreign Service Personnel. A statement by the Chairman of the Foreign Service Personnel Board, with this report attached, was placed before the Secretary of State, which recommended plaintiff's immediate separation from the Foreign Service because of neglect of duty and conduct unbecoming a Foreign Service officer as shown by his record and the hearing thereon previously held. The Secretary of State approved this recommendation on March 14, 1932.

March 16, 1932, the Secretary of State wrote the plaintiff as follows:

> MAURICE C. PIERCE, Esquire,
> *American Consul,*
> *St. John, New Brunswick.*
>
> SIR: In accordance with the recommendation of the Foreign Service Personnel Board, and in the interest of the public service, you are hereby removed from the office of Foreign Service Officer, Class VII, effective March 31, 1932.
>
> Very truly yours,
> [Signed] HENRY L. STIMSON,
> *Secretary of State.*

This letter was received by plaintiff March 18, 1932.

6. March 19, 1932, plaintiff wrote the Secretary of State as follows:

> I have the honor to acknowledge the receipt of your communication of March 16, 1932, informing me that I am removed from the office of Foreign Service Officer, Class VII, effective March 31, 1932.

I protest against this act because there are no grounds therefor and no charges have been presented to me. I respectfully request that you reconsider the question of my removal from the Foreign Service until such time as I may have opportunity to answer any charges that may be presented against me.

March 22, 1932, the Secretary of State acknowledged receipt of the foregoing letter by telegram as follows:

> Your letter of March 18. Instruction of March 16 removing you from office effective March 31, 1932, confirmed.

7. March 24, 1932, the plaintiff addressed a letter to the President, which reads as follows:

> I have the honor to quote herewith from an instruction of March 16, 1932, which was addressed to me and received on March 18, 1932.
>
> "In accordance with the recommendation of the Foreign Service Personnel Board, and in the interest of the public service, you are hereby removed from the office of Foreign Service Officer, Class VII, effective March 31, 1932.
>
> "Very truly yours,
>
> "HENRY L. STIMSON,
> "*Secretary of State.*"
>
> Having been appointed to the office above referred to by the President with the advice and consent of the Senate, I deem it appropriate to protest to you against this act on the part of the Secretary of State which clearly violates the Act of February 23, 1931, the President's Executive Order of June 8, 1931, and Section 44 of the Consular Regulations.
>
> You are informed that there are no grounds for such action, that my efficiency record has not been called to my attention at any time since the passage of the Act of February 23, 1931, and that no charges have been preferred against me.
>
> I respectfully request that you promptly intervene in my behalf and notify me at your earliest possible convenience the results of such intervention.

March 26, 1932, this letter from the plaintiff was by the President transmitted to the Secretary of State by letter which reads:

Please find enclosed herewith a letter from one of your personnel. I would like your advice as to what I should do in the matter.

8. In a letter dated March 31, 1932, addressed to the President, the Under Secretary of State briefly reviewed the case and advised the President as follows:

> In reply to your request for my advice as to your course in this matter, I would suggest that you instruct me to inform Mr. Pierce that you have forwarded to me his communication to you with instructions to inform him that my communication to him of March 16 has your approval and will become effective on March 31, 1932.

April 1, 1932, the Secretary to the President wrote to the Under Secretary of State as follows:

> The President has directed me to acknowledge the receipt of your communication of March 31st regarding the letter from Mr. Maurice C. Pierce, American Consul at St. John, New Brunswick, protesting against his removal from the office of Foreign Service Officer of Class VII, and to request that the Department deal with the matter.
>
> I am returning the papers which accompanied your communication.

April 6, 1932, the Assistant Secretary of State wrote a letter to the plaintiff which reads as follows:

> The President has referred to this Department your communication to him of March 24, 1932, protesting against your removal from the office of Foreign Service Officer, Class VII, and by his direction you are informed that your separation from the Service became effective March 31, 1932.

9. The State Department by a letter of March 16, 1932, instructed plaintiff to relinquish charge of the Consulate at St. John to the Vice Consul at the close of business on March 31, 1932. March 26, 1932, by letter (Plaintiff's Exhibit 17) plaintiff was instructed to relinquish charge of the Consulate to Consul Richard P. Butrick, which the plaintiff did on March 31, 1932.

10. Richard P. Butrick, Consul of the United States of America, assumed charge of the Consulate at St. John, New

Brunswick, at the close of business March 31, 1932, in the place of plaintiff, and served until the close of business May 15, 1932; Conrad Spangler, Vice Consul of the United States of America, assumed charge of the Consulate from Consul Butrick and served until the close of business July 11, 1932; Philip Adams, Consul of the United States of America, assumed charge of the Consulate from Vice Consul Spangler and served until the close of business April 16, 1935; J. Brock Havron, Vice Consul of the United States of America, assumed charge of the Consulate from Consul Adams and served until the close of business May 24, 1935; Egmont C. von Tresckow, Consul of the United States of America, assumed charge of the Consulate from Vice Consul Havron and served until June 30, 1937; Thomas D. Davis, Consul of the United States of America, assumed charge of the Consulate from Consul von Tresckow and has continued to serve at St. John until the present time. All the aforesaid persons were duly paid their salaries as officers in the Foreign Service of the United States.

11. Since March 31, 1932, plaintiff has not received from the defendant any pay or emolument as a Foreign Service officer.

12. After his removal, plaintiff returned to Washington and consulted an attorney and, with the attorney, called at the office of the Secretary of State and demanded to see the Secretary. The Secretary declined to see them. Plaintiff made subsequent attempts to see the Secretary but he was unsuccessful. Subsequently plaintiff interviewed several attorneys about a court proceeding, but no attorney would take the case without a retainer fee which plaintiff did not wish to pay.

Plaintiff returned to Madison, Wisconsin, and in October 1932 received from the State Department from the Foreign Service Retirement and Disability Fund of the State Department, a refund of $1,800.75 representing deposits from plaintiff's former salary as a Foreign Service officer.

13. From November 1933 to April 1934, plaintiff was employed by the Civil Works Agency. He was employed first as an adjuster at a salary of $200 per month. On December 16, 1933, his salary rate was changed to $47 per week and his

employment continued on such basis until January 12, 1934. On the latter date, plaintiff became Director of Adjustment at a weekly salary of $51 per week. From March 15, 1934, to April 15, 1934, he received $24 per week as a supervisor. From September 1935 to July 1937, he was employed on various projects of the Works Progress Administration, receiving a salary of approximately $83.00 per month throughout such period.

14. The evidence of record presents no satisfactory explanation as to why plaintiff delayed from the date of his removal from office on March 31, 1932, until March 17, 1938, to file his petition herein, other than that plaintiff thought he had six years within which to bring suit.

The court decided that the plaintiff was not entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

The plaintiff, after passing an examination before the Board of Foreign Service of the State Department, was on September 14, 1917, appointed by the President with the advice and consent of the Senate as Consul, Class VIII, of the United States. July 1, 1924, the President, with the advice and consent of the Senate, appointed plaintiff a Foreign Service Officer, Class VII, to hold and exercise that office during the pleasure of the President and until the end of the next session of the Senate, and no longer. Thereafter, December 20, 1924, the President, with the advice and consent of the Senate, appointed plaintiff a Foreign Service Officer, Class VII, to hold and exercise that office during the pleasure of the President. Thereafter plaintiff was assigned and served as set forth in finding 2.

Sections 32 and 33 of the act of February 23, 1931, 46 Stat. 1207, 1214, 1215 (Title 22 U. S. C., Sections 23 (h) and (i)), read as follows:

> SEC. 32. The Division of Foreign Service Personnel shall assemble, record, and be the custodian of all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign Service officers, including reports of inspecting officers and

efficiency reports of supervising officers. All such information shall be appraised at least once in two years and the result of such appraisal expressed in terms of excellent, very good, satisfactory, or unsatisfactory, accompanied by a concise statement of the considerations upon which they are based, shall be entered upon records to be known as the efficiency records of the officers, and shall constitute their efficiency ratings for the period. No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto. The Assistant Secretary of State supervising the Division of Foreign Service Personnel shall be responsible for the keeping of accurate and impartial efficiency records of Foreign Service officers and shall take all measures necessary to insure their accuracy and impartiality. * * *

SEC. 33. * * * Whenever it is determined that the efficiency rating of an officer is unsatisfactory, thereby meaning below the standard required for the service, and such determination has been confirmed by the Secretary of State, the officer shall be notified thereof, and if, after a reasonable period to be determined by the circumstances in each particular case, the rating of such officer continues to be found unsatisfactory and such finding is confirmed by the Secretary of State after a hearing accorded the officer, such officer shall be separated from the service with the annuity or bonus provided in this section * * *.

Executive Order of June 8, 1931, provided that all action taken by the Board (the Foreign Service Personnel Board) shall be strictly nonpartisan, and based exclusively upon the record of efficiency of the officers concerned.

Cases of the character of the present one involving claims for the recovery of salary present two questions: First, whether or not the removal was illegal, and, second, whether plaintiff has been guilty of laches in bringing suit. A suit to recover salary for removal from office contrary to and in violation of a law of Congress is within the jurisdiction of this court under section 145 of the Judicial Code; Title 28, U. S. C., section 250. *Richardson* v. *United States*, 64 C. Cls. 233; *United States* v. *Wickersham*, 201 U. S. 390; *Burnap* v. *United States*, 252 U. S. 512, 518–520; *Norris* v. *United*

States, 257 U. S. 77, 81, 82; *Medkirk* v. *United States*, 44 C. Cls. 469; *Ruggles* v. *United States*, 45 C. Cls. 86. The defense of laches is applicable to such a suit. *Arant* v. *Lane*, 249 U. S. 367, 372; *Nicholas* v. *United States*, 257 U. S. 71, 75–77; *Norris* v. *United States*, *supra; Baskin* v. *United States*, 95 C. Cls. 455; certiorari denied, 316 U. S. 675.

The first question to be decided is whether the officer was legally or illegally removed. If the proof shows that he was legally removed, that ends the matter—for if the action of the proper Government officials conformed to and complied with the statute or applicable regulations their decision is not subject to review by the court. *Burnap* v. *United States*, *supra; Norris* v. *United States*, *supra; Medkirk* v. *United States*, *supra; Ruggles* v. *United States*, *supra; Baskin* v. *United States*, *supra.*

After a careful study of the record in this case, we are of opinion that the action of the Secretary of State on March 16, 1932, effective March 31, complied with all Acts of Congress and the regulations. This action was confirmed by authority of the President after plaintiff, on March 24, 1932, had appealed to him on the grounds, as alleged by plaintiff, that there were no grounds for the action of the Secretary of State; that his efficiency record had not been called to his attention at any time since the passage of the act of February 23, 1931, and that no charges had been preferred against him. The evidence shows that the information and facts before the Foreign Service Personnel Board of the State Department and the Secretary of State with reference to plaintiff's personal and official conduct and ability showed that plaintiff's character, ability, conduct, quality of work, industry, experience, dependability, and availability for foreign service were wholly unsatisfactory. As set forth in finding 4 the State Department, as a result of the information before it as to the unsatisfactory character of plaintiff's record, on January 21, 1931, ordered plaintiff to appear before the Foreign Service Personnel Board on January 22, 1931, at 3 p. m. This hearing on plaintiff's record was ordered and held for the purpose of giving plaintiff notice of his unsatisfactory record and conduct and of affording him an opportunity to be heard on that charge. Theretofore the State

Department had been lenient with plaintiff in order to give him a chance to improve his conduct. He had been transferred from place to place by reason of unfavorable reports from his superiors, the last transfer being late in 1930, when his assignment to Stuttgart was terminated; he was then assigned to Buenaventura, Colombia. Plaintiff protested this transfer and sought assistance from certain members of the Senate to prevent it. The hearing before the State Department Foreign Service Personnel Board was held and plaintiff was advised of his unsatisfactory record and was heard thereon. He was later dismissed because of this unsatisfactory record on which the hearing had been held.

The Personnel Board considered plaintiff's record to be unsatisfactory and so found, but concluded by reason of a request made on behalf of plaintiff, to afford him one more opportunity to improve his unsatisfactory record and to demonstrate, if he could, to the State Department his fitness as a foreign service officer. Accordingly, he was given a probationary assignment as consul at St. John, New Brunswick, Canada. The State Department made this assignment on condition that plaintiff would measure up to the requirements of a Foreign Service officer. Accordingly, on January 26, 1931, the State Department notified plaintiff of this assignment. After a year at St. John, the State Department received complaints with reference to the unsatisfactory conduct of plaintiff during his assignment there. The State Department made an investigation which disclosed that plaintiff had continued his unsatisfactory record, in that he had consistently neglected his duties at St. John; he had no standing whatever in the community and his conduct, under that assignment, had been such as to discredit the Government. This applied to plaintiff's official and personal duties and conduct throughout his probationary assignment at St. John. As a result the State Department Foreign Service Personnel Board, on the basis of plaintiff's record prior to January 21, 1931, the hearing held by the Board on such record on January 22, 1931, and plaintiff's conduct and record under the probationary assignment at St. John, recommended to the Secretary of State that plaintiff be removed from office. Accordingly, on March 16, 1932, the Secretary of

State removed the plaintiff effective March 31, 1932, as set forth in finding 5. Thereafter plaintiff appealed to the President and protested the action of the Secretary of State as set forth in finding 7. The President transmitted plaintiff's protest to the Secretary of State and asked for his advice. The Secretary of State prepared and transmitted to the President a full report which reviewed plaintiff's case, whereupon the President after consideration of the matter returned the papers to the Secretary of State and directed that the State Department deal with the matter. Accordingly, after consideration by the State Department of plaintiff's protest to the President, he was advised in writing that his separation from the service was confirmed and was effective March 31, 1932.

Upon these facts we think it is clear that plaintiff's removal was not illegal and that the State Department in removing him from office acted in full compliance with the regulations of the State Department and the act of February 23, 1931.

Plaintiff makes a point of the fact that the Secretary of State did not prefer further charges and grant him a second hearing on his record after the act of February 23, 1931, was approved. But this was not necessary to the legality of the action of the Secretary of State in removing plaintiff on March 16, 1932. That action of the Secretary was the culmination of proceedings taken by him under and in conformity with the regulations and procedure in force before the act of 1931 was approved and which regulations and procedure, as well as the proceedings had by the State Department on plaintiff's record, complied with and conformed to the procedure set forth in section 33 of that act. The Personnel Board had found plaintiff's record to be unsatisfactory and had granted plaintiff a hearing thereon. The fact that plaintiff was given a probationary assignment in that connection, in order to afford him an opportunity to overcome his unsatisfactory record, in connection with which he utterly failed, did not compel the Secretary of State or the President to make further charges and grant plaintiff a further hearing. The President and the Secretary of State in the circumstances

did not deem such a second hearing necessary and in this they were clearly right. Plaintiff's petition must therefore be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

NOLAN BROS., PARTNERS, FOR THE USE AND BENEFIT OF NOLAN BROS., INCORPORATED, v. THE UNITED STATES

[No. 43982. Decided October 5, 1942. Plaintiffs' motion for new trial overruled February 1, 1943]

On the Proofs

Government contract; construction of lock on Mississippi River; employment of labor under National Industrial Recovery Administration Act.—Where plaintiff, contractor, entered into a contract with the Government to furnish all labor, plant and materials and to perform all work required for the construction of Lock No. 7, near La Crosse, Wisconsin, on the Mississippi River; and where under the provisions of the contract the plaintiff was obligated "to the fullest extent possible" to utilize labor chosen from the lists of qualified workers submitted by agencies designated by the United States Reemployment Service, under the provisions of the National Industrial Recovery Administration Act; and where it is established by the evidence that in complying with said labor provisions plaintiff had great difficulty in securing the necessary men who were experienced and qualified to do the heavy construction work called for; and where it is established that in the enforcement of said labor provisions the requirements and restrictions imposed by the defendant resulted in delay and extra costs to the plaintiff and that the plaintiff was thereby handicapped in many ways not contemplated by the contract; it is *held* that the plaintiff is entitled to recover.

Same.—Where restrictions as to labor employment imposed upon the plaintiff by the defendant resulted in increased costs; and where under the terms of the contract plaintiff was entitled to be informed in advance of such restrictions and was not so informed; it is *held* that plaintiff is entitled to recover.

Same; defendant not obligated to furnish only qualified labor.—Under the terms of the contract in suit the defendant was not obligated to furnish, through the United States Reemployment Service, only labor qualified to do the work. *Seeds & Derham* v. *The United States*, 92 C. Cls. 97, 312 U. S. 697, cited and reaffirmed.

Same.—Whether a particular case, involving a contract under the Works Progress Administration program of the N. I. R. A. Act, falls within the principles laid down in the *Seed & Derham* case, must be decided on the facts of such case as it arises.

Same; duty of plaintiff to select qualified labor.—Under the provisions of the contract in suit it was the duty of the plaintiff to select the labor it found qualified from the groups that were furnished by the National Reemployment Service.

Same.—Plaintiff was not required to accept any labor that might be sent by the National Reemployment Service, regardless of whether such labor was qualified.

Same; special jurisdictional act.—The special jurisdictional act under which the instant suit is brought was manifestly intended, within the limits therein set out, to provide a trial of the case on its merits.

The Reporter's statement of the case:

Mr. Huston Thompson for the plaintiff.

Mr. William A. Stern II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Rawlings Ragland* and *Elihu Schott* were on the brief.

The court made special findings of fact as follows:

1. Nolan Bros. is a partnership composed of William L. Nolan and Aloysius T. Nolan, which is engaged in the general contracting business, with offices in Minneapolis, Minnesota. Nolan Bros., Incorporated, is a corporation organized under the laws of the State of Minnesota in 1931, with offices in Minneapolis, Minnesota, and is engaged in the general contracting business.

2. A special jurisdictional act (50 Stat. 533) applying to this and other contracts for constructing navigation dams and locks on the Mississippi River and its tributaries was approved July 23, 1937, and reads as follows:

AN ACT

To confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of contractors for excess costs incurred while constructing navigation dams and locks on the Mississippi River and its tributaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress as-

sembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their personnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

3. On November 4, 1933, in response to public advertisement and invitation for bids published by defendant, Nolan Bros., Partners, submitted a bid and on November 16, 1933, Nolan Bros., Partners, and defendant entered into a contract for the furnishing by the partnership of all plant, labor, materials, and for the performance of all work required for the construction of Lock No. 7, Mississippi River, near La Crosse, State of Wisconsin. On November 27, 1933, Nolan Bros., Partners, executed an assignment of the contract to Nolan Bros., Incorporated. The Board of Directors of the corporation passed a resolution "to accept the assignment and

carry on the construction of the work." However, the work was carried out in the name of the partnership.

Plaintiff, under an amendment granted by the Court under date of April 22, 1941, is "Nolan Bros., Partners, for the Use and Benefit of Nolan Bros., Incorporated."

4. The original contract price was approximately $1,319,-989.00. The entire work was to be completed within 365 calendar days after receipt of the notice to proceed. Plaintiff prepared a progress schedule under which, with normal and favorable conditions, it expected to complete the work on or before November 15, 1934. Twenty change orders were issued during the progress of the work. As a consequence there was an increase in the contract price and the time for completion of the work was extended. Plaintiff completed the work within the time limit in the contract, including the extensions of time. The defendant admits that the project was carried out and completed in a satisfactory manner, and that plaintiff "did a good job."

5. This contract was one of the series of Nation-wide projects more commonly known as P. W. A. Projects, authorized by the Federal Emergency Administration of Public Works. The Federal Emergency Administration of Public Works was organized under Title 2 of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195), and financed from funds appropriated for carrying it into effect as part of a Government program intended to relieve unemployment.

6. Prior to the submission of its bid plaintiff received from defendant the bidding schedule, United States Government Form of Contract and specifications No. P. W. A. 51, dated September 7, 1933, Bulletin No. 51 of the Federal Emergency Administration of Public Works, dated September 7, 1933, and District Engineer Form No. 1 P. W. A. dated Nov. 15, 1933, which document was entitled "Compliance with National Recovery Act and Public Works Administration provisions of Contracts."

7. The contract was formally approved by the Government February 5, 1934, and formal notice to proceed was given plaintiff on that date; however, plaintiff had previous knowledge that it was the low bidder and would doubtless

be awarded the contract and, with the knowledge and consent of the district engineer, actually began work at the site of the project during the latter part of November 1933, when grading and excavation were commenced for the material yard and other preliminary work.

8. The contract provided in part as follows:

> ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

The specifications provided in part as follows:

> 20. *Claims and Protests.*—If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within 10 days thereafter, or be considered as having accepted the record or ruling. (See Articles 3 and 15 of the contract.)

The contract also provided:

> ART. 19. (a) *Labor Preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivisions and/or county in which the work is to be performed and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: *Provided*, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services, shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however*, That organized labor, skilled and unskilled, shall not be required to register at such local employment agencies, but shall be secured in the customary ways through recognized union locals. * * * In the selection of workers from lists prepared by such employment agencies and local unions, the labor preferences provided in section (a) of this article shall be observed.

Bulletin No. 51 contained the following language:

SEC. 10. Employers may use organized or unorganized labor. Unorganized labor shall be obtained from local employment agencies designated by the United States Employment Service. * * * See Form P. W. A. 51, Article 19 (b) * * *.

The specifications further provided:

6. *Commencement, Prosecution, and Completion.*—

* * * * *

(b) In case of failure on the part of the contractor to complete the work within the time thus determined and agreed upon for its completion, the contractor shall pay to the Government as liquidated damages the sum of $250.00 for each calendar day of delay until the work is placed in safe and practical operating condition, as determined by the contracting officer, and thereafter the contractor shall pay to the Government as liquidated damages the sum of $25.00 for each calendar day of delay until the remaining work to be performed under the contract is completed and/or accepted.

* * * * *

District Engineer Form No. 1, dated November 15, 1933, Plaintiff's Exhibit 2, made a part hereof by reference, after quoting the provisions of Section 206, Title II, of the National Industrial Recovery Act, *supra*, which contains practically the same wording as set out in Article 19 (a) and (b) of the contract, in interpreting the policy made the following statement:

Accordingly, it is necessary that the United States Employment Service should organize the reemployment

agencies in many of the counties of the United States in order that there will be places at which "selected lists of qualified workers" may be "submitted to employers." The United States Employment Service cannot "designate" such local reemployment agencies, unless it can be responsible for their organization and their procedure.

9. A generally informative picture of the project in question is shown on drawing M–L7–19/1 (plaintiff's exhibit No. 5); also from photographs, plaintiff's exhibits 15–26, inclusive, and defendants' exhibits 8, 54, and 55, all being in evidence and made part hereof by reference. Exhibit No. 26, particularly, being a photograph of the completed work, shows the work constituting plaintiff's project, consisting of a lock wall marked "C," auxiliary gates marked "D," intermediate wall marked "E," gates of main lock marked "F" and "G"; land wall marked "H," central control station marked "I," and upper guide wall marked "J." The lower guide wall is not shown.

10. Plaintiff planned its work, generally, to be done in the following order:

(1) Build an office, tool house, and material yard;
(2) Set up concrete plant;
(3) Drive the steel piling forming the cofferdam outside the area;
(4) Build a trestle to transport concrete and other materials from the material yard to the work;
(5) After completion of cofferdam, dredging to be done inside the cofferdam—the cofferdam to be closed and pumps set up to dewater the cofferdam;
(6) Set with derrick barges one steel wall cut-off to stop infiltration into lock;
(7) When cofferdam was dewatered, rigs to be set in there for driving wood piling and steel piling.
(8) Build forms and place concrete for the lock and dam.

11. Mr. Arthur A. Prendergast, who was an experienced and qualified engineer in heavy construction work, although he had never built a lock and dam, and who was interested financially with Nolan Bros. in the contract, was the general manager, and was present actively superintending the work during the construction operations of the contract.

Mr. D. H. Shoemaker, assistant engineer to Mr. Prendergast, was also on the project throughout the entire work.

Mr. J. M. Knox was field superintendent; Mr. J. C. Lynch was paymaster, timekeeper, and general contact man with the reemployment office.

Major Dwight F. Johns, District Engineer, was the contracting officer representing the Government.

Lieutenant James A. Stratton, and, subject to him, Mr. Taylor and Mr. Bjork, represented the defendant to see that P. W. A. regulations were enforced.

12. Plaintiff brought to the project from its own organization at the beginning of the work its general manager and assistant, timekeeper and assistant, grading foreman and field superintendent. Of these the grading foreman and field superintendent were required to register at the La Crosse reemployment office. Plaintiff was also permitted to bring certain other men as foremen, and others for administrative work on the project, including the keeping of cost records, but these were limited by defendant to a much smaller number than plaintiff contended it was entitled to bring. Plaintiff felt that it should be permitted to bring from its organization additional keymen and from time to time skilled workmen which it claimed it had difficulty in securing through the reemployment office.

13. Labor was to be obtained from employment agencies in La Crosse County, Wisconsin, and Winona County, Minnesota, in the first instance and, if sufficient qualified labor was thus unobtainable, then from these States at large, and if necessary from other states.

Winona County, Minnesota, has 637 square miles, with a population of 35,144, its largest city, Winona, having a population of 20,850. It is predominantly an agricultural community. La Crosse County, Wisconsin, has 481 square miles, with a population of 54,455, the city of La Crosse having a population of 39,614. The county is both agricultural and industrial.

14. The National Reemployment Service, generally designated as "NRS", received applications from men out of work and compiled lists therefrom. In receiving applications the NRS would take from an applicant a brief history of his working experience, as to the class of labor he had performed. Norman E. Shulze, who was manager of the La Crosse Re-

employment Office after Mr. Sanborn, the former manager, was transferred, was 29 years old and had been a claims adjuster and had had no previous experience in personnel work like that at the La Crosse office. His time was taken up largely with administrative duties and he did little of the placement work. The major part of the placing of workers on Lock No. 7 was done by Mr. Gillette, who was 25 years old and who had had no previous experience in that kind of work. The local NRS also furnished labor to one or more of the projects on the river being carried on at the same time.

15. During the period of construction of Lock No. 7, four locks and dams were in the process of construction in the nearby area, all drawing labor through the La Crosse, Wisconsin, and Winona, Minnesota, labor offices. In the upper Mississippi area at the time of said construction, there were nine major construction projects of a similar nature. These projects, together with the Lock No. 7 project, were part of the general Government program aimed at controlling the upper waters of the Mississippi River. The contractor had knowledge of the huge Government construction program at the time of its bid, it having bid on some of the other project contracts prior to the date on which it became the successful bidder on Lock No. 7.

At the time of submitting its bid plaintiff was familiar with and aware of labor conditions in the area where the work was to be carried on.

16. The plaintiff bid on the contract as a nonunion job.

17. At the outset of the work on the project, in November 1933, representatives of the National Reemployment Service met with representatives of the contractor and of the defendant to discuss labor procurement and procedure of furnishing labor to the contractor.

As a result of this conference prior to beginning work, Mr. Sanborn informed plaintiff that the La Crosse office was to be the place where plaintiff's orders for workers were to be sent; that plaintiff was to be given a list of laborers for the job; that plaintiff could procure various classes and kinds of labor from these lists and make up plaintiff's lists from them. Plaintiff was asked to submit a rough idea of how

many it would need, and this plaintiff did. Plaintiff never received the lists to cover the rough draft. Thereafter, plaintiff asked Mr. Sanborn for the lists numerous times, but they were never furnished. Plaintiff also endeavored to procure a list from Mr. Gillette.

No one representing defendant made any provision for supplying plaintiff with lists of workers in advance and no lists were prepared for it by the representatives of the P. W. A.

The procedure of enrolling and sending men to Lock No. 7 was as follows: When the men entered the La Crosse office they were subjected to a series of questions and gave answers which were placed upon a filing card. In the absence of lists furnished in advance to plaintiff by defendant, plaintiff called for workers. When the calls came the La Crosse office sent as many men as it had on hand. It gave the men cards showing their names and occupations and sent them out to the lock. .

A day or two after the men were sent, the La Crosse office followed this up with a registration card in triplicate to plaintiff. At times the La Crosse office sent workers who had not been interviewed and who came without cards, but the general practice was for the Reemployment Office to interview them and furnish them a card which contained information which the applicant had furnished as to his experience and qualifications.

Plaintiff was furnished with printed forms upon which to make its requests for labor, indicating the number form, and classification of labor desired. This form is Federal Form No. 104, and is in evidence as plaintiff's exhibit No. **14**, which is by reference made a part hereof. All of the labor requisitions are likewise in evidence as defendant's exhibit No. 56, made a part hereof by reference.

18. The La Crosse office, which had a list of approximately 3,000 workers from which to select, received the requests for labor from plaintiff. Requisitions were issued by plaintiff for approximately 1,653 men, while the number of men referred by the La Crosse office amounted to approximately 1,968 men. The La Crosse office made no attempt to investigate the physical condition of the men it sent. Some of the

men were physically unfit to perform any kind of work and others were not in a physical condition to do heavy outdoor construction work. The Employers Mutual Life Insurance Company, together with plaintiff, employed Dr. McGarty in September 1934 to examine the men sent on Lock 7 for employment. The number rejected for unfitness, being about 30 percent, was so great that Dr. McGarty, with offices in La Crosse, requested Mr. Schulze to let him examine the men at his office before they were sent to Lock 7. In some instances this was done, but most of the men were examined on the job. The Reemployment Office was about 7 miles from the lock. The contractor's personnel officer, Lynch, frequently went to get the men and bring them back to the project. He often failed to get a complete quota at the time he asked for the men. He sometimes asked for men by name, but they were not furnished in this way, but simply by groups. On one occasion an appeal for two form carpenters for whom he had asked by name was made and the St. Paul office permitted him to have them.

19. Under date of December 15, 1933, the contracting officer wrote plaintiff a letter, which reads in part as follows:

> To avoid future misunderstanding, it will be necessary for the contractor to submit to this office the names of men they desire to induct into the local area. Positions or labor classification and home addresses of men should be stated. Names of men approved by this office will be sent to the Reemployment Director at La Crosse and the contractor may then ask the Director to call on their respective home Reemployment Offices for the men.
>
> It is desired that the names of the men already engaged on the work who were brought into the local area by the contractor, be sent to this office through the Resident Engineer. Their home addresses and the positions they occupy should be stated.

20. Under date of January 6, 1934, the contracting officer wrote plaintiff quoting an expression of policy of the Public Works Administration, as follows:

> It is the purpose of the Public Works Administration to put as many men to work, as quickly as possible, and continue them at work, as far as feasible, during the

> winter months. In furtherance of this purpose, this memorandum is issued to those in charge of various construction projects to continue work during the winter season without interruption so far as it is economically feasible.
>
> Ordinarily, the course of least resistance would be to shut down all construction work during cold weather, whereas, with a proper arrangement of the working hours during the day and a proper scheduling of the work, it will be possible to do much of that class of construction which would ordinarily be deferred until next spring.
>
> Your attention is called to this in order that work may be prosecuted in any feasible way that will keep men on the pay roll this winter.

The contracting officer advised plaintiff that, in conformity with this policy, he urgently requested every consideration be given to a vigorous prosecution of the work under the contract for the construction of Lock No. 7, and that no effort be spared in continuing such vigorous prosecution throughout the life of the contract.

21. In response to a letter from plaintiff dated January 20, 1934, the contracting officer under date of January 26, 1934, gave plaintiff permission to put Mr. Iver Klevin, Labor Foreman, at work on the project. In this letter the contracting officer also advised the plaintiff as follows:

> The following quotation is from the Chief of Engineers' ruling [dated September 13, 1933] regarding key men:
>
> "Contractors with existing organization may take an existing skeleton organization of keymen including foremen to new work under National Industrial Recovery Act, but the remainder of the force for the work must meet the requirements of Art. 19 (b) of Government Form P. W. A. 51 and of Section 10 of P. W. A. Bulletin 51."
>
> It is believed that only principal foremen, that is foremen supervising skilled workers, were intended to be included in this category. The only exception made will be in the case of men who have been a permanent part of contractor's force for some time. It is expected, however, that granting of authority in such cases will be rare.

22. In order to expedite matters, plaintiff, in accordance with an understanding with the La Crosse office, instead of sending requisitions in advance, generally telephoned for workers, mailing the requisitions later.

23. In response to plaintiff's call for labor the La Crosse office sent applicants, some of whom were experienced and able to perform the work required. Many others were not qualified or able to perform the required work. Many of the workers were inexperienced in the handling of tools and wholly without experience in heavy construction work. There were instances where men sent to the project as applicants for work either had no tools of their own or did not know how to properly handle tools with which to work, and failed to put up their tools in the place provided for that purpose. Some applicants came wearing tennis shoes, which created danger to themselves in the heavy construction work; one or two men sent out as skilled workers were untrained in handling cranes, overturning 6 of them within the first 6 months and in some instances smashing the booms; a northwest crane boom was tipped backward twice in one day. Some of the carpenters were inexperienced in reading the drawings or building forms and recesses and inserts, causing loss of time and excess costs. Occasionally some men would idle.

Toward the end of the job plaintiff wanted to put on an extra riveting crew with a view to saving pumping time on one of the cofferdams, and requested permission to employ an experienced crew who had formerly worked for him and who were then available. This permission was refused by the La Crosse office on the ground that riveters were available through the Reemployment Service. Plaintiff took the crew sent out by the La Crosse office, but so much of their work was rejected by the Government inspector that the men were dropped at the end of the first day. Permission was again requested to employ the experienced crew and again refused, and a crew brought down from Milwaukee. Their work was also unsatisfactory and they were let go after six hours' work.

There was considerable unemployment in the section and among the applicants for work were some who had been

clerks, a cripple with a wooden leg, who for a short time tried to run a tractor, a professor, a hairdresser, and a conductor who were put to work, but were unable to hold out. Farmers were sent. Men were sent who were good house carpenters and efficient as such, but not experienced as form carpenters in heavy construction work—a difference in type and skill of work. Many of them were good men, but on account of having been trained in other lines of work were not experienced in performing the type of work required on this project.

Some difficulty was experienced at the beginning in handling electric vibrators for mixing concrete. Some of the laborers would put the vibrators too deep in the mix and they would become stuck. On other occasions they were left in the concrete with the motors cut off. Men would get stuck and have to be pulled out, leaving their boots in the concrete. The work with the vibrators was slow. At times two men were required to handle a 60 or 70 pound vibrator, when one experienced man should handle it. Electric vibrators were new and men were inexperienced in handling them. Even the Government inspectors knew nothing about them. Finally, plaintiff put a special foreman on them, after which time the work was somewhat improved.

On one occasion, owing to the carelessness of the operators, two engines traveling on the trestle in plain sight of each other collided, in spite of the fact that warning signals were being given them. Both engines were wrecked. A crane boom was broken twice in one day.

The lack of experience of the men in this type of work clearly increased the cost of operation.

24. Plaintiff employed such of the applicants for work as it wanted and laid off or discharged such labor as it deemed proper. However, in many instances when men were laid off or discharged complaints would be filed with the Reemployment Office and the contracting officer or defendant's engineer would insist on the matter being investigated. The respective foremen under whom the men worked would be called to the office for a conference at which a representative of plaintiff as well as a representative of the Reemployment Office would be present. Present also were the men who

were discharged, as well as other workers, and great pressure was brought to have the men restored to work, even when they had been discharged for incompetency. Plaintiff was compelled to place many of these men back at work, in most instances transferring them to other types of work. It was compelled to restore one man three times. In several instances when foremen were called from their duties to attend hearings or conferences their crews would be left without supervision for an hour or two, which tended to interfere with the work on the project. One foreman was called to three different conferences in one day. This practice interfered with plaintiff's control of the men, as well as delaying the progress of the work. In order to avoid it, plaintiff adopted the policy of dropping unsatisfactory men at the end of the day without having their names appear on the pay roll and their cards were then taken out of the active file.

This investigation of complaints by workmen was in compliance with a regulation by defendant.

25. The District Engineer wrote plaintiff on March 29, 1934, as follows:

> 1. It is my opinion that the number of skilled employees exempt from the thirty-hour week as being in the supervisory class, now engaged on P. W. A. projects in this District, who have been permitted to come in to the jobs as key men, is at present sufficient to insure the safe and efficient operation of present equipment. Present personnel of the type described should be sufficient to train additional skilled operators obtained from local reemployment offices on the equipment now on hand or of equivalent type which may subsequently be brought to the work.
>
> 2. It will be the policy, therefore, to require that all additional operators for present equipment or equipment of equivalent type, be obtained from the Reemployment Agencies rather than to be brought in as key men, until such time as it is apparent that there is not sufficient competent local labor available to meet the demands of the various jobs.

26. May 4, 1934, plaintiff wrote defendant outlining its skeleton organization for carrying on the work, as follows:

We are handing you herewith our skeleton Organization Plan proposed for work on Lock No. 7 at Dresbach.

Based on a twenty-hour working day, we proposed to use two ten-hour-day concrete Superintendents with two five-hour-day working foremen under each one. We propose to use two ten-hour superintendents on the straight wall monoliths and two ten-hour superintendents on gate recesses, inserts, tainter sections, etc. The above men will have five-hour foremen under their direction.

On the steel work, we propose to use one ten-hour superintendent with two five-hour foremen under his direction.

We will also have a general labor foreman, and a timber superintendent who will work in a supervisory capacity ten hours per day.

The above men will be weekly salaried men who will work only in a supervisory capacity.

We feel that we need these men to properly guide the five hour foremen.

We have already been given permission to place on our pay roll, J. M. Knox, D. H. Shoemaker, Arther Sehlin, and Ivor Klevin. We therefore request at this time to place on our pay roll in the near future the following men:

N. F. Nelson of Minneapolis, Hennepin County, as Concrete Superintendent at $54.00 per week.

Martin Peterson of Minneapolis, Hennepin County, as Steel Superintendent at $54.00 per week.

Alex Cartier of LaCrosse, Wisc., LaCrosse County, as Asst. Carpenter Superintendent at $54.00 per week.

George Mahowald of LaCresent, Huston County, as Asst. Carpenter Superintendent at $54.00 per week.

We have had permission to place on our pay rolls as a ten hour superintendent in charge of track and material yard, John Barkowitz of Minneapolis. We request your permission to change this man's capacity to that of Asst. Concrete Superintendent.

We have not at present decided on the men for the timber superintendent and the last carpenter asst. superintendent and consequently cannot give you the names of these two men.

27. The District Engineer wrote plaintiff May 12, 1934, granting authority to employ certain named operators desired:

Receipt is acknowledged of your letter dated May 4, 1934, inclosing copies of your organization chart for

Lock No. 7 and requesting approval to employ certain keymen on your work.

Authority is hereby granted to employ N. F. Nelson as concrete superintendent, and Martin Peterson as steel superintendent, pursuant to their proper registration at the local Reemployment Office.

In view of the fact that Alex Cartier, George Mahowald, and John Barkowitz are now in your employ at Lock No. 7, further authority from this office regarding them is not necessary.

* * * * *

28. Plaintiff's work at the beginning was to build offices and other structures for its plant, excavation work, building of a trestle from the material yard out over the main project for the transportation of concrete and other material for building the cofferdam, preparatory to the prosecution of the work under the contract. For this purpose plaintiff had adequate supervisory superintendents and foremen, and required principally skilled and unskilled labor and form carpenters.

29. The principal or major portion of the work of building the lock was the proper erection of the sections or monoliths by building large forms containing inserts and recesses of varying sizes, to hold great masses of concrete, and it was necessary that they be made strong and true to line and grade in order to build the lock.

The form work really commenced in the field the latter part of May or early in June 1934, and doubled during July, after Mr. Nolan made a check of the progress of the work with Mr. Prendergast and, noting the slowness of production, directed that more men be put on the work. The number of men was increased and the work kept on schedule. Plaintiff could have built the forms with a smaller number of carpenters had the rules and regulations permitted more than one helper to each carpenter, and had the rules not further provided that a helper could not do any work except within the sight and hearing of the carpenter, and had more form carpenters been available.

30. Plaintiff had on the project Mr. Granger, who laid out each section of the form work, showing the necessary inserts built in accordance with small sketches taken from the larger plans, and these sketches were furnished the car-

penters so that they could with accuracy erect the forms for the monoliths. Experienced form contractors do not as a rule require these sketches but are able to build forms from the general plans. Most of the carpenters for this job were house carpenters The house carpenter builds for permanency, and uses great care in finishing. This takes additional time. The form carpenter knows that his work will be torn up in two or three days, but must be built for strength. In the latter type of construction a much greater part of the work can be done by helpers. Mr. Granger's duty also required him to calculate the number of square feet in each form from the time sheets turned in each day from the work. Thus the cost of form work was calculated from the number of square feet and the amount spent each day.

31. Costs on the project were obtained by the following method: Time cards were distributed to the different foremen who would enter the number of hours and what work the men, respectively, performed on the job. The cards were gathered up each night and a record was obtained as to the total amount of money spent on each operation for the day. Plaintiff thus ascertained a unit cost. A record was kept as to the cost of each monolith. These cost records were watched and the foremen were frequently brought together in conference and shown the unit costs and where excessive or not, and they were urged to perform their work so as to prevent excessive costs.

32. Included in the duties of Mr. Lynch, junior paymaster, was the giving of first aid to those who received minor injuries, insufficient to incapacitate them for work. A great many such cases were handled at the office, largely after working hours, and consisted mainly of slight cement and concrete burns, some nail punctures, and now and then a scalp wound. If an injury occurred that was more than temporary, and incapacitated a man for work, a report was made of it and the man would be sent to a physician. Both major and minor injuries such as were received by laborers on this contract were to be expected in carrying on any project of this kind, but on the instant project there was a larger proportion of accidents than might be termed normal.

The handling of injuries on this project proceeded in this way until about September 1, 1934.

33. By September 1, 1934, the main hiring of carpenters for the project was over. Major accidents had become numerous. At the request of the covering insurance company the plaintiff arranged with Dr. McGarty, who was experienced in employer's liability work and who had been handling all the hospitalization cases from the start, to examine the new applicants before they were assigned to work. The doctor did this at the project site, examining all applicants and also those already at work. Applicants were stripped and given a careful examination. Defects found among the men examined were heart trouble, hernia, high blood pressure, varicose veins, defective teeth, impaired hearing, and defective vision. Those who were unqualified for work were turned down.

This amounted to approximately 3 out of 10 men who were not accepted for employment. Of those actually at work on the project 40 percent had some physical defect which, in the opinion of the doctor, unfitted them for heavy construction work. The doctor and insurance company were requested by plaintiff to allow some of these men to work at certain types of work. For example, if a man had defective hearing the doctor would advise that he should not be allowed to go near cranes; or, if he had high blood pressure that he be kept on the ground and not go up in the air. Twenty men were fitted with trusses to correct hernia. The foreman was informed of physical defects of applicants, and he exercised his own judgment in employing or refusing to employ such men.

During the time that Dr. McGarty was at the project site 287 men received injuries which necessitated that they either be hospitalized or laid off. Fifteen major concrete or cement burns were reported, while many men suffered minor burns or other slight injuries.

34. Two men lost their lives during the progress of the work. One man slipped from a tunnel form, fell to the footing below onto reinforcing rods sticking up from concrete which pierced his lung, causing his death.

The other man was on the working trestle repairing his truck and fell, which resulted in his death. There was no railing at that point to protect the man on the trestle while at work.

These occurrences appear to have been accidents resulting from carelessness on the part of the men, possibly contributed to by lack of protective arrangements on the part of plaintiff, but which accidents are apt to occur in projects of heavy construction of this character.

35. At first plaintiff laid off inexperienced men and put others on, but found that many men who were sent to the project to take the place of the ones laid off were no better than the ones discharged. Plaintiff complained repeatedly to the La Crosse office and to the P. W. A. officers as to the lack of qualifications of men sent by the La Crosse office to the engineer. It asked to be permitted to bring more keymen of its own selection and more skilled men who had had experience, claiming it was unable to get sufficient qualified men from the Reemployment Office. On March 29, 1934, the district engineer insisted that this situation be remedied by plaintiff's training the men assigned from the Reemployment Office so that they would be able to do the work. (See letter set out in finding 25.)

Plaintiff then began to train inexperienced men. The men were invited to come for a certain number of hours after the day's work, on particular days of the week, when they were instructed in the performance of the work and how to protect themselves in the presence of heavy machinery and dangerous situations. They were also shown the costs incurred on the various units of the project. However, when the keymen or foremen stopped to teach these inexperienced men on the project P. W. A. men stopped the keymen or foremen and reprimanded them. The gangs or groups were then reduced in size, additional foremen were put on and the skilled and experienced men were left in with the unskilled so that the unskilled could learn to do the work more rapidly. As a result of the training the injuries decreased, the work was more efficiently performed and progressed more rapidly, and costs were reduced. The training

was kept up until the concrete work was practically completed. However, the work was still progressing slowly and getting behind schedule. In order to avoid the assessment of liquidated damages the plaintiff greatly increased the number of carpenters and secured permission from the contracting officer to employ six keymen to act in a supervisory capacity.

36. Plaintiff made numerous complaints to representatives of the defendant regarding inefficient labor up until and through the construction of the gates and the steel work. Major Johns and his subordinates called personally at the National Reemployment Service office in La Crosse on numerous occasions in order to suggest means that might meet the complaints as to the class of labor sent on the project.

37. In making requisition for labor in order to complete its organization of skilled workers, plaintiff applied for experienced and skilled operators on its gas crane and stiff leg derrick. The Reemployment Office furnished such labor for the purpose as it found available, but the men furnished proved to be inadequate, causing plaintiff to write defendant's resident engineer on the project, under date of May 19, 1934, the following letter:

> As one of the firm of Nolan Brothers, on Lock No. 7, covering the various inquiries we have made into damage done by trying to use inexperienced operators on our Gas Crane and Stiff Leg Derrick.
>
> I wish to state that our losses to date have been approximately as follows:
>
> Delays due to dropping Hammer and Piling on Derrick No. 1 approximately $170.00. Loss to equipment on Gas Tractor Engine, due to broken Boom, $800.00. Delay caused by replacing Boom and lost time in pumping, $100.00.
>
> This does not in any way reflect the overhead and other hidden costs, which would probably add another ten percent to these figures.

No further complaint or protest in writing was made by plaintiff regarding this matter.

38. Under date of July 9, 1934, the following letter was written by plaintiff to Major Johns, the contracting officer:

We are having a lot of difficulty in getting experienced runners for our Steam Cranes, our Stiff Leg Derricks, and Gas Cranes, in spite of the fact that we have been allowed to date, to get runners without going through the U. S. Employment Agency. Could it be arranged to let our experienced runners which we have, go on a 48-hour basis, until such a time that we can fill in with good runners, then to put them all back on the 30-hour week. We make this request in view of an accident which we had here Saturday evening. A runner was sent to us through the Winona Office, carrying the following letter of recommendation:

"This will introduce James Crandall of Minneapolis.

"Mr. Crandall is a steam engineer, has been operating pile drivers and stiff leg derricks. He is also an experienced locomotive crane operator.

"If you can use this man we will be glad to certify him to you. Should you want him to go to work at once you can call us up and we will mail card for him.

"Yours truly,

"NATIONAL REEMPLOYMENT SERVICE
"A. C. GERNES, *District Manager*
"By S. S. HAMMER"

This man, after operating the crane for about five minutes doubled up the boom over the bank and set the crane back on its rear end, causing about $3,000 damage. We were fortunate to have another locomotive crane in Minneapolis to rush down to handle our yard work. But, I think you will understand, it was just a miracle that no men were injured, outside of a slight bruise to the fireman, who was thrown out of the cab when the crane went backwards.

Major Johns, the contracting officer, on July 16, 1934, answered the letter of plaintiff dated July 9th, as follows:

Receipt is acknowledge of your letter of July 9 requesting permission to employ your operators of cranes, derricks, and similar equipment up to 48 hours per week.

Inasmuch as you have been unable to secure experienced operators, your request is hereby approved until such time as you are able to obtain a sufficient number of operators to prosecute the work on a 30-hour week and/or 130-hour month basis.

I appreciate the difficulties under which you have worked while attempting to utilize inexperienced men, but at the same time wish to point out that you should make every effort to obtain enough additional operators to permit you to go back to the 30-hour week and/or 130-hour month. If necessary, you may employ as key men any operators of whom you have knowledge.

In this connection, I understand that there has been some difficulty in administrative procedure between your job office and the La Crosse Reemployment Office. I can see no objection to telephone requests for labor, but such a request must be followed promptly by a formal request on Form No. 104. I also believe that it will be of benefit to you, as well as to the Reemployment Agency, if you will notify them promptly when laying off men because of incompetency. This is especially important in cases involving labor in skilled trades, where the Reemployment Service has experienced considerable difficulty in locating competent and experienced men. I am confident that by following these suggestions you will prevent misunderstanding and promote greater efficiency in the matter of employment.

39. Under date of July 20, 1934, plaintiff wrote the contracting officer for permission to put on six men as five-hour lead men on the carpenter gang.

The contracting officer replied to this letter under date of July 24, granting permission to employ the men named "because of the inability of the Reemployment Service to furnish you with skilled carpenters who are experienced on heavy construction."

40. Under date of July 24, 1934, the contracting officer also wrote plaintiff enclosing copy of a letter sent on July 21 to the State Reemployment Directors of Minnesota, Wisconsin, and Iowa, relative to the employment of skilled carpenters as keymen, stating that this was as a result of complaints he had received from a number of the contractors engaged in lock and dam construction in this district. The contracting officer advised plaintiff in his letter that in the event it was unable to secure a sufficient number of competent skilled carpenters through the reemployment service, and if

it had knowledge of men from outside areas, plaintiff would be allowed to bring a limited number to the job as keymen; that in every case an appropriate request should be made, and men so employed should be registered at the reemployment agency.

Ratio of Journeymen and Helpers 1 to 1 Rule

41. One of the complaints that plaintiff made to the contracting officer was as to the number of helpers to a skilled journeyman allowed to be used by plaintiff on the project.

The contract contains the following provisions relative to skilled and unskilled labor:

> ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:
>
> Skilled labor ______________________________ $1.20
> Unskilled labor ____________________________ .50
>
> * * * * *
>
> (d) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."
>
> (e) The minimum wage rates herein established shall be subject to change by the Federal Emergency Administration of Public Works on recommendation of the Board of Labor Review. In event that the Federal Emergency Administration of Public Works acting on such recommendation establishes different minimum wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract.
>
> (f) The Board of Labor Review shall hear all labor issues arising under the operation of this contract and as may result from fundamental changes in economic conditions during the life of this contract. Decisions of the Board of Labor Review shall be binding upon all parties.

In accordance with subdivision (d) of the above article, the wage rate for helpers was set at 75 cents per hour.

Soon after plaintiff began construction, defendant introduced orally and enforced many new restrictions upon the foremen, helpers, and laborers. No helper was allowed to handle any tools or to do any work except in the presence of a journeyman. A helper could not use a rule or measure a board under any circumstances. He could not drive a nail or saw lumber unless in the presence of a journeyman-carpenter. The rule so restricted the work of helpers that the contractor found it advisable to have less than one helper to a journeyman-carpenter and advanced many of the helpers to the grade and pay of carpenters, even though not fully qualified, so that they might work without such restriction. This definitely increased the cost of the contract. Most of the helpers not so advanced were laid off.

42. Under date of December 15, 1933, Major Johns, the contracting officer, wrote plaintiff as follows:

> There has arisen a number of questions pertaining to the classification of labor engaged in lock and dam construction which makes it appear necessary for the contracting officer to ask the Chief of Engineers to extend the interpretations published under Paragraph 5, Section 3, District Engineer Form No. 1 (P. W. A.).
>
> The present interpretative rulings of the Engineer Department for lock and dam construction do not include all classes of labor. Your views as to the extension of this list for others who may be employed on your work would be greatly appreciated.
>
> Under the present interpretation "Apprentices and helpers are men not thoroughly experienced, but who assist and work under the direction of skilled labor." The question seems pertinent as to the proportion of apprentices and helpers to the corresponding skilled grade, which may be employed in each of the skilled trades. There seems to be no question that apprentices and helpers function under the direction of skilled labor. In effect, this means that no groups of helpers or apprentices would work under foremen without the guidance of skilled mechanics in their trade. It seems advisable to fix the proportion of apprentices and helpers to skilled labor rather than placing any interpretation

or limitation in the type of work and the nature of the tools they may use in their particular trades.

Your views as to the proportion of apprentices and helpers to skilled labor in each of the trades employed on lock and dam construction would be greatly appreciated. A prompt response to this request will also be appreciated.

Under date of December 18, 1933, plaintiff replied as follows:

Replying to your favor of December 15th pertaining to the classification of Labor in Lock and Dam construction, we appreciate the opportunity to express our views on this question and have prepared a table indicating the number of apprentices and semiskilled laborers and their scale, which would, in our judgment be a fair proposition to allow working under skilled labor in the same classification. This has been worked up from the organization which we have used in our past work.

Perhaps our carpenter helpers may seem high to you, but we call attention to the fact that a form carpenter is not a trade that requires the same accurate skill as building carpenter, and insofar as in large work of this type we will no doubt be using panel forms where the main operation after the form is once made up is pretty much routine work, the percentage of skilled labor required is necessarily reduced.

We also wish to suggest in the matter of crossing flagmen which are required on Lock No. 7 that insofar as this operation can be handled by disabled men not capable of doing common labor that possibly these men should be placed on a monthly basis as shown and allowed to work a 10-hour day.

There is another matter which we feel is perhaps not clearly defined, and that is regarding assistant Foremen working under the general Foremen in charge of major operations. These men are commonly known on construction work as straw bosses. It is our belief that they should come under semiskilled labor and for efficiency in operation it would, we know, facilitate matters for us if they could handle two 5-hour crews subject to Section 3, Paragraph 1.

Skilled labor		Number of semiskilled allowed with each skilled laborer and his rate		
Class	No.	Class	No.	Rate
Enginemen (operators of hoisting equipment).	1	Firemen	1	$0.75
Machinists	1	Assistant Machinist	1	0.60
Machinists	1	Handymen	3	0.55
Brick Layers	2	Helper	1	0.60
Form Carpenters	1	Form Carpenter's Helpers	10	0.60
Crib Carpenters	1	Crib Carpenter's Helpers	10	0.60
Building Carpenters	1	Bldg. Carpenter's Helpers	2	0.60
Concrete Finishers	1	Concrete Finisher's Helpers	4	0.60
Welders	1	Helpers	2	0.60
Electrician	1	Helpers	4	0.60
Blacksmith	1	Helpers	2	0.60
Painters	1	Helper	1	0.60
Structural Steel Erection Crew	4	Helpers	4	0.60
Structural Steel Rivet Crew	4	Helpers	4	0.60
Plumbers & Steam Fitters	1	Helper	1	0.60
Placers of Steel & Conduit Pipe and iron railing.	1	Helpers	4	0.60

Additional Semiskilled labor working under men in Section #3, Paragraph 11.

SEMISKILLED

Assistant Foremen (see p. 4)	$0.80
Truck Drivers	0.60
Dinkey Operators	0.65
Pumpmen	0.75
Mixer Operators	0.75
Pile Driver Leadmen	0.75
Powdermen	0.75
Reinforcement & Embedded metal placers	0.65

43. Plaintiff's representatives had several conferences with the contracting officers about the restrictive regulations and in May 1934 defendant brought plaintiff's attention to a circular letter from the District Engineer to all Resident Engineers. This circular contained the restrictive rules as applied to helpers. Many of the rules set forth in Plaintiff's Exhibit 53, made a part hereof by reference, had already been enforced previous to May 1, 1934. Plaintiff in making its bid had prepared its estimates without taking such restrictions into consideration, assuming that the customary practices would prevail. The effect of these restrictive rules was to increase the costs by increasing the number of men employed and making it necessary to pay journeymen's wages for work normally done by helpers.

44. Plaintiff contemplated, when making its bid, the use of one carpenter with four helpers in monolith form con-

struction. The erection and tearing down of forms, being frequently repeated, caused laborers performing such work to become experienced, so that plaintiff determined to use helpers to assist a journeyman-carpenter. One carpenter at $1.20 per hour with 4 helpers at 80 cents per hour amounts to $4.50, or an average wage rate of 90 cents per hour. However, under the restrictions or rule insisted upon by the defendant, plaintiff put carpenters in place of helpers in many instances, thus materially increasing the cost for building monolith forms. The advancing of helpers who were not fully qualified to the grade and pay of a journeyman-carpenter caused many of the regular carpenters to become discouraged, thus lowering the morale of the organization and interfering with the progress of the work.

Plaintiff made no written protest to this requirement as instructed to do in Art. 15 of the contract and Art. 20 of the specifications, but proceeded with the work of the project without protest.

45. Under date of August 20, 1934, the defendant put in written form the rule regarding skilled journeymen and helpers in a letter from the District Engineer to plaintiff, reading as follows:

> 21. The following ruling published by the Chief of Engineers in Circular Letter (Finance No. 189) dated August 16, 1934, will govern in the employment of helpers on all P. W. A. projects:
>
> 1. The following rules, conforming to the policies of the Board of Labor Review, will be applied to the use of helpers on existing and future P. W. A. contracts:
>
> (a) The total number of helpers of any craft employed by a contractor shall not exceed the number of journeymen or skilled workers employed in that craft.
>
> (b) The number of helpers on any part of the work will not be limited, but no helper will be allowed to work except under the direction of a journeyman. There is no objection to the use of simple tools by bona fide helpers provided they do not work independently of journeymen. Helpers will not be required to provide their own tools.
>
> (c) In arriving at the number of journeymen employed, working foremen of the craft (foremen who use tools and whose hours of work are limited) may be classed as journeymen.

(d) In cases where the contractor claims that the allowance of helpers should be more liberal, he will be given the opportunity to appeal to the Board of Labor Review and the enforcement of the prescribed ratio will be held in abeyance pending a decision. If the decision is adverse he will be required to make up the difference in pay for the elapsed period.

2. For the skilled trades, semiskilled classifications such as rough carpenter, form builder, saw and hatchet man, rough painter, etc., will not be allowed. There is no objection to the semiskilled classification of form setter where the men do not use carpenters' tools.

3. In the future, men requisitioned and certified from the National Reemployment Service as skilled craftsmen will not be employed as semiskilled workmen unless recertified as such.

46. After receipt of District Form No. 1 (PWA), dated August 20, 1934, plaintiff on September 14, 1934, wrote the contracting officer as follows:

* * * * *

While we wish to state at this time that we have adjusted our organization to live up to this requirement in every detail as noted. We find that with very few exceptions that it is going to increase our pay-roll output, and we wish to put ourselves on record to take exceptions to it at this time on the grounds that we believe that there is nothing in our contract which requires us to limit the number of semiskilled laborers working under skilled journeymen.

To this letter the contracting officer on October 3, 1934, replied as follows:

Receipt is acknowledged of your letter dated September 14, 1934, regarding the provisions of Paragraph 21 of Section III, District Engineer Form No. 1 (PWA), dated August 20, 1934.

These provisions are not intended as changes or additions to your contract, but serve simply as administrative interpretations in connection with the performance of the contract. Your attention is invited to the fact that the ruling was published by the Chief of Engineers as well as the contracting officer, and conforms to the policies of the Board of Labor Review.

If you wish to continue your protest of the ruling, the provisions of Art. 15 of your contract, PWA 51, permit you to appeal to the Chief of Engineers, whose deci-

sion will be binding and conclusive upon all parties. In addition, paragraph 1 (d) of the quotation contained in the above ruling provides that you may make appeal to the Board of Labor Review for a more favorable allowance on the number of helpers if you so desire.

47. On October 23, 1934, the contracting officer again wrote plaintiff regarding the established proportion of helpers to skilled mechanics, as follows:

* * * * *

A letter of protest to the District Engineer is not the proper procedure. The appeal should be addressed to the Board of Labor Review and should be accompanied by all supporting data which the contractor desires to submit.

48. On November 2, 1934, plaintiff wrote the following letter to the Board of Labor Review at Washington:

On September 14th, 1934, we wrote the District Engineer of St. Paul, Major Dwight F. Johns, taking exception to the recent establishment of the proportion of helpers to skilled mechanics, dated August 20th, 1934. Major Johns advised us that it would be more proper for us to appeal to the Board of Labor Review protesting this ruling.

We, therefore, wish to say at this time, that the established proportion of helpers to skilled mechanics, as proposed in your letter of August 20th, we feel it is outside of the scope of our contract under which we based our prices for doing work on Lock #7.

We therefore wish to place ourselves on record as protesting that ruling as a whole, and will, when called upon, present data substantiating our claim that such a ruling has materially increased the cost of work on Lock #7.

Won't you please consider this letter as a nonacceptance of your ruling of August 16th, 1934, pending any further hearings that you may grant us along with other contracts along the river pertaining to same.

49. Under date of November 28, 1934, the District Engineer addressed the following letter to Nolan Bros.:

The following paragraphs from the Chief of Engineers' letter of November 20, 1934, are quoted for your information and guidance:

"1. Reference is made to paragraph 1 (d) of Circular Letter (Finance No. 189) of August 1934, in which the enforcement of rules regarding helpers is suspended where contractors desire to appeal to the Board of Labor Review.

"2. The contractors on the Upper Mississippi River, who indicated a desire to appeal, have been given full opportunity to be heard by the Board of Labor Review, but have failed to appear and have requested a long delay in the hearing of the case. In view of the fact that they have not chosen to prosecute their appeal at this time, the enforcement of the rules concerning helpers will not be further postponed by the Department.

"3. The above instruction is issued at the request of the Board of Labor Review. As a matter of fact, it is understood that practically all, if not all, contractors are now observing the requirements of the Circular Letter."

There is no evidence of record that the Board of Labor Review ever passed directly upon the question of the restrictive regulations. The evidence does show that at the request of the various contractors, including plaintiff, the Board of Labor Review held a meeting at St. Paul on June 28, 1935. Plaintiff offered proof to the effect that the 1-to-1 rule was called to the Board's attention at that meeting and that the Chairman stated that the Board had no authority over such a regulation. This meeting was held after the instant contract was completed. The evidence does not show that any official action was taken.

50. In carrying out the rules a carpenter's helper was not allowed to lay out work or make measurements, but was restricted strictly to use of a hammer and saw. He could not take a board and measure a dimension, draw a line, and saw it. He would be allowed to saw it only after the journeyman carpenter had marked the board. The record shows an instance where a carpenter on a light tower requested a helper who was down below him to measure and cut 1 x 4's for the ladder, but the helper was not permitted to do this because he was out of sight and hearing of the journeyman-carpenter. A carpenter asked his helper to put in a few bolts and tighten them in a form, and then left temporarily to go to another

form. The helper thus being out of sight or hearing was stopped and ordered to work under his journeyman.

Reference to plaintiff's exhibit 23 shows a panel. Helpers in nailing strips to lag, using a 20-penny nail with a 6-pound striking hammer, were stopped on the ground that it was carpenter work. On the forms (26′ wide) shown on the same exhibit, bolts pass through the form wall to wall. A carpenter aligning these forms would have a man around on the other side to tighten the bolt, and a helper was sent around on the other side for that purpose. The helper was stopped because when on the other side of the form he was out of sight and hearing of the journeyman.

Plaintiff had men in the toolroom to care for tools and a good part of the time they were not busy, and plaintiff attempted to use them on small odd jobs, but the men were stopped on the ground that their work was to take care of the tool shed and that they could not do other work.

51. In the contracts that plaintiff had prior to this time, which had no restrictions as to wages or helpers, as applied in the instant contract, it had been accustomed to employ many of its own experienced crews since many men continued from contract to contract, and (on bridge jobs) where work was carried on in four or five cofferdams at one time, plaintiff would oftentimes have one general foreman over the four or five different, separated crews of carpenters. The carpenters being experienced in that kind of work would carry the work along without a crew foreman.

Plaintiff had also been accustomed to using nonunion labor, i. e., men who could be put at any kind of work without restrictions such as were encountered on this project. If a laborer were found qualified to do the work of a carpenter helper, there was no restriction against his being assigned to do such work. If a helper was qualified, he would be permitted to carry on the work commonly done by a journeyman. Plaintiff had also been accustomed to using trained and skilled laborers as helpers, as these men who had long followed heavy construction work, and had gone from job to job, had become adept and skilled in all phases of heavy construction work, especially form work.

Delays and Excess Costs

52. Plaintiff commenced construction of the cofferdam, heavy excavation work, form work, and concreting approximately a month or more later than contemplated by the progress chart. The defendant granted extensions of time under Change Orders Nos. 3, 14, and 18, which provided for additional work, as set forth therein. However, plaintiff was materially delayed in the carrying on of the work by adverse weather conditions, being economically unable to work with heavy ice in the river.

Plaintiff was also delayed by the necessity of additional excavation, much of it difficult, requiring expensive clamshell operation. Defendant had estimated that the amount of excavation would be 40,000 cubic yards, whereas it was necessary to excavate 55,471 cubic yards.

Plaintiff was also delayed by damage caused by a wrecked boom on Derrick No. 13, as shown on photograph dated February 2, 1935. It was also delayed because of the turning over of a pile-driving rig on January 8, 1934, where the trestle bents were scoured.

Plaintiff was also delayed by an error in setting stakes for the cofferdam. Defendant's representative had miscalculated and had given an incorrect line for the cofferdam. This mistake had to be corrected.

Plaintiff was also delayed when the cofferdam was constructed due to a mistake by defendant's representative in setting the stakes incorrectly for the permanent steel sheet piling line. Plaintiff drove the steel sheet piling and it had to be pulled and redriven on correct lines.

53. Plaintiff claims $717.50 for excess costs for pile driving. This work was done by a subcontractor, the Oakes Construction Company, which obtained its labor from the Reemployment Office. Plaintiff's representative had seen a skilled crew of Oakes Construction Company drive 4, 5, and 6 piles per hour, while the average on this job was 2.9, or approximately 3 piles per hour, under conditions existing on this contract.

During the early portion of the form work there was considerable wastage of lumber by workmen who were inex-

perienced in tearing down forms and recesses, resulting in some excess costs. However, as the work progressed, the men became trained in form work. Carpenters were subsequently assigned to this particular phase of the work, and lumber was actually saved.

54. Plaintiff also claims excess costs in connection with building of forms, contending that the excess costs of labor, materials, and the restrictions as to journeymen and helpers resulted in the amount of excess costs claimed.

Plaintiff bases its claim for excess costs of $78,000.00 on form work, in part, on the cost of a test made by it on monolith 1-5-A while the actual work was in progress. It computed the difference between the *actual cost of the forms per square foot* on the project, and its computation of the "fair and reasonable" cost of construction of the form work. The men employed on this test form were selected by plaintiff from other crews as an average crew that was doing good work. Plaintiff, in fixing its "fair and reasonable" cost based it upon its former experience and former costs—what should constitute a crew, how many carpenters and helpers, efficient helpers that were not limited in what work they could do on the project, and the price they were paid per hour.

55. Plaintiff employed on the project not over 8 carpenters and 6 helpers per week up to June 1, 1934. After that date the weekly average per month of carpenters and helpers, as shown by plaintiff's roll, was as follows:

1934	*Carpenters*	*Helpers*
June (5 weeks)	31	[1] 32
July	119	41
August	144	50
September (5 weeks)	110	93
October	73	41
November	28	12
December (5 weeks)	18	8
1935		
January	6	3
February	15	11

[1] [Note: No helpers were employed until March 17, 1934, when there were 4.]

The total number of men employed on the project, as shown by plaintiff's pay roll, during November and Decem-

ber 1933, was an average of 61 men per week. Thereafter the average number of men employed on the project per week was as follows:

1934	*Average number*
January	86
February	116
March	130
April	124
May	179
June (5 weeks)	438
July	918
August	991
September (5 weeks)	899
October	549
November	297
December (5 weeks)	228
1935	
January	157
February	206

The peak of the work appears to have been performed from approximately July 21, 1934, to August 11, 1934, and the total number of men shown by plaintiff's pay roll is 1,024, 1,026, 1,052, and 1,017, respectively, per week for that period. After August 11, 1934, there was a gradual decrease in the number of men until September. After September the number of men rapidly decreased until the completion of the work.

Plaintiff made oral or telephone requisitions for form carpenters during the progress of the work, but the written requisitions show that only 27 *form carpenters* and 157 *form carpenter helpers* were requisitioned, and that the written requisitions did not begin until September 16, 1934.

Plaintiff made written requests for 195 carpenters in all.

Plaintiff made oral complaints to the representatives of the defendant from time to time, but made no protest or complaint in writing regarding the type of ordinary labor applicants for work, in accordance with the specifications.

Plaintiff's pay roll is in evidence as defendant's exhibit No. 68, and made part hereof by reference.

56. Plaintiff's expenditures in carrying out the project were as follows:

Actual work on the project	$1, 207, 380. 47
Overhead	264, 865. 47
Total	$1, 472, 245. 94

The defendant agrees that these amounts are accurately stated.

Plaintiff claims excess costs in the sum of $246,826.36, as set out in detail in plaintiff's exhibit No. 54, which lists in table 1 the items on which plaintiff claims excess costs, giving in the first column, for each item, "*Reasonable Cost Under Contract Conditions*"; in the second column, "*Actual Cost Under Operating Conditions*", and taking the difference gives in the third column the "*Total Excess Costs*" for each item of its claim. The "*Total Excess Costs*" is still further subdivided into "*Excess Labor Cost on Account of Restricted Use of Helpers*", "*Excess Labor Cost on Account Unqualified Labor & Government Rulings*", and "*Excess Costs of Materials, Insurance, and Other Items*".

Plaintiff's method of calculation and break-down in order to arrive at its excess costs and divisions of costs will be found in plaintiff's exhibits Nos. 54 and 55.

Plaintiff's statement of "*actual costs*" is agreed to by the defendant as being correct. Plaintiff's statement as to "*fair and reasonable costs*" under contract conditions is disputed by the defendant. Plaintiff in part bases its calculation of "fair and reasonable costs" upon inefficiency of labor and on a greater number of helpers to one journeyman than the ratio of 1 to 1, as was enforced by the defendant.

Plaintiff's estimate of fair and reasonable costs takes into account its past experience with its own and other experienced, skilled and trained crews of men; the use of carpenters and helpers at a ratio of 4 or more to 1, with helpers and unskilled labor being unlimited as to the kind and amount of work they could perform. The price paid for labor under previous contracts is not shown.

57. Due to the national emergency and subsequent to the date of plaintiff's contract, the Government promulgated and enforced rules and regulations referred to in previous findings and in its administration misinterpreted, wrongfully enforced and disregarded certain of them as herein-

before set out. It also enforced, as noted in previous findings, regulations not referred to in and not authorized by the contract. These acts interfered with and deprived plaintiff of normal control of its personnel. The defendant also in certain instances heretofore noted declined to permit plaintiff to secure the necessary number of keymen and skilled men when these were not available through the Reemployment Office. As a result, the plaintiff incurred costs in excess of what they would otherwise have been. Some of the items of cost can be calculated with accuracy. Others cannot be so calculated. The evidence is sufficient as to still other items to furnish a reasonable and fair approximation of the excess costs. After eliminating the items that cannot be definitely calculated, a fair and reasonable approximation of the excess costs is the sum of $40,000.

SECOND CAUSE OF ACTION

58. At the hearing at St. Paul, Minnesota, on October 11, 1940, counsel for plaintiff and defendant agreed and stipulated with respect to the second cause of action, as set forth in paragraph Nine of the Second Amended Petition, regarding the guide wall, in lieu of offering testimony, and the commissioner so finds as follows:

> That in the construction of the upper guide wall, by letter dated November 12, 1934, confirming verbal instructions of November 10, 1934, the placing of concrete in the upper 160 feet of the upper guide wall was stopped by the Government in order to allow the United States to make foundation investigations and to study the advisability of redesign; that the work was thereby delayed for a period of 18 days; that thereafter the contracting officer determined that due to the 18-day delay in the prosecution of that portion of the contract, the plaintiff suffered additional expense incurred for winter concreting and building of cofferdam around a portion of the upper guide wall, which increased expense could not have been anticipated by the plaintiff in accepting the award of the contract and that the payment for the additional work required and expense incurred because of the delay, should be made in the amount of that expense, to wit, $16,994.62; that thereafter a change order was sent to the plaintiff and although it was not signed

by the plaintiff, it could not have been approved by the chief of engineers because final payment had been made and all the work had been done under the contract, and the Government does not intend to offer any defense to the facts set forth in the cause of action as now stated to the Court.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is one of several suits that were brought by the different contractors for alleged excess costs incurred in carrying out their respective contracts for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries.

The act conferring general jurisdiction on the Court of Claims was broadened for these particular cases by a special jurisdictional act approved July 23, 1937, which is set out in full in finding number 2 of the Special Findings of Fact and will not be repeated here.

The bid of Nolan Bros., in response to public advertisement and invitation for bids to furnish all plant, labor, and materials and perform all work required for the construction of Lock No. 7 near La Crosse, Wisconsin, was accepted and contract was executed November 16, 1933.

The original contract price was approximately $1,319,989. The work was to be completed within 365 calendar days after receipt of notice to proceed. The contract provided for liquidated damages in the sum of $250 per day for each day's delay beyond the date fixed for completion until the work should be placed in safe and practical operating condition, and thereafter $25 per day as liquidated damages for each additional day's delay in final completion. Certain change orders were issued and the contract price and time of completion adjusted accordingly. The work was completed within the time specified and was accepted as satisfactory.

The contract covered one of a series of projects generally known as P. W. A. projects, authorized by the Federal Emergency Administration of Public Works, the latter being organized under the provisions of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195).

Formal notice to proceed was given on February 5, 1934, but plaintiff had previously been informed that it was the low bidder and would probably be awarded the contract, and with the permission of the officials in charge did some preliminary work prior to that date.

Prior to making its bid plaintiff received from the defendant, together with bidding schedule, form of contract, and specifications, Bulletin No. 51 of the Federal Emergency Administration of Public Works, dated September 7, 1933, which contained the following language:

> SEC. 10. Employers may use organized or unorganized labor. Unorganized labor shall be obtained from local employment agencies designated by the United States Employment Service, * * *. See Form P. W. A. 51, Article 19 (b) * * *.

It had also received District Engineer Form No. 1 P. W. A., containing Circular Letter (Finance No. 150) dated September 13, 1933, which contained the following provision:

> * * * Contractors with existing organizations may take an existing skeleton organization of keymen, including foremen to new work under National Industrial Recovery Act, but the remainder of the force for the work must meet the requirements of Article 19 (b) of Government Form P. W. A. 51 and of Section 10 of P. W. A. Bulletin 51.

Plaintiff brought to the project from its own organization certain administrative officials and employees, as well as certain keymen to be used as foremen. Labor generally was to be obtained through the National Reemployment Service from La Crosse County, Wisconsin, and Winona County, Minnesota, and if sufficient qualified labor was not thus obtainable, then from these states at large and, if necessary, from other states.

Plaintiff alleges several grounds of complaint as a basis for its first claim. It says that defendant failed to furnish lists of qualified workmen in accordance with the terms of the contract and compelled it to use men who were not experienced or skilled in heavy construction work; that it repeatedly refused to permit plaintiff to bring in available men whom it knew to be qualified and experienced in this type of

work; that it made restrictive rules and regulations not contemplated by and not authorized by the contract and misinterpreted and misapplied other regulations, and by the issuance of such unreasonable regulations and the misinterpretation and misapplication of others greatly increased the cost of construction. Plaintiff's first claim is for excess costs, damages, and expenses amounting to $280,927.89. Its second claim is for $78,940.29, making a total of $359,868.18, for which plaintiff sues.

Defendant answers that it was not obligated by the contract to furnish qualified labor, but was only required to furnish groups of men from which plaintiff could make its own selection; that the furnishing of lists was not insisted upon by the plaintiff; that the restrictive rules and regulations which were issued were reasonable; that the plaintiff was permitted to bring in such essential keymen, administrative officers, and foremen as the contract contemplated, and that the plaintiff, therefore, is not entitled to recover on its first claim.

The general method used by the National Reemployment Service was to accept applications, have applicants make a statement as to their experience, make out a card and send the applicants over with the card, thus permitting plaintiff to make its own selection from the group furnished.

The area in which the work was done was largely an agricultural section, with one or two small cities that had some industrial activity.

In response to plaintiff's call for labor, the La Crosse Reemployment Office sent groups of men to the project. Some of them were experienced and able to perform the work required; many others were neither qualified nor physically able to do the required work. Many of the workers were inexperienced in the handling of tools and wholly without experience in heavy construction work. Many had no tools and did not know how to handle or care for them. Some had only tennis shoes, which were wholly unsuited to heavy construction work. Consequently there were numerous foot injuries. Some of the men sent out as skilled workers were not trained in handling cranes, overturning six of them within the first six months, seriously damaging them. Many

of the carpenters were inexperienced in reading the drawings or building forms and recesses and inserts for this type of work, thus causing loss of time and excess costs. At one time plaintiff asked permission to employ an experienced riveting crew which had formerly worked for him and which was then available. This permission was refused by the La Crosse office on the ground that riveters were available through the Reemployment Service. Plaintiff took the crew sent out by the La Crosse office, but so much of the work was rejected by the Government inspector that the men were dropped at the end of the first day. Plaintiff again asked permission to use the experienced crew, but was again refused, and after a two days' delay the La Crosse office sent down another crew from Milwaukee. Their work was also unsatisfactory and they were let go after 6 hours' work. A large part of the work done by these men was rejected by the Government inspector and had to be done over. When plaintiff was laying derrick stone the men tipped a northwest crane boom backward twice in one day.

There was considerable unemployment in this section and among the men sent down were some clerks, a cripple with a wooden leg, a professor, a hairdresser, and a conductor. Some of the men who were sent down were good house carpenters and efficient as such, but inexperienced in heavy construction work. Difficulties were encountered in securing men who were qualified to operate the electric vibrators. Inexperienced men permitted them to become stalled or set in the concrete. Men would get stuck and have to be pulled out, leaving their boots in the concrete. On one occasion owing to the carelessness of the operator, two engines, traveling on a trestle in plain sight of each other, collided, in spite of the fact that warning signals were being given. Both engines were wrecked. A crane boom was broken twice in one day. The men's lack of experience in this type of work greatly increased the costs of operation.

Before going into the other phases of the case we will take up the question of whether defendant was obligated, as contended by plaintiff, to send out only men who were qualified to do the work which was required; that is, to practically guarantee their qualifications. Applying the doctrine laid down

in *Seeds and Derham* v. *The United States*, 92 C. Cls. 97, 116, certiorari denied 312 U. S. 697, we hold that, according to the contract, defendant did not assume such obligation. Plaintiff was aware of the purposes for which the P. W. A. was organized and the work laid out. The provisions of the law itself declared the purposes for which it was enacted. It could not have expected in the circumstances to have a list of men fully qualified in every respect, but only labor of such quality as might be expected when all the circumstances, as well as the purposes of the act, were taken into consideration. It was its duty under the contract to select the labor that it found qualified from the groups that were furnished by the National Reemployment Service. We do not hold that plaintiff was required to accept any labor that might be sent, regardless of whether it was qualified. Provision was made in the contract for additional groups to be sent from which the men might be selected, and further provision was made for permitting the securing of key and other skilled men in the event sufficient qualified men were not furnished by the Reemployment Service. The contract provided that these men could be brought in by the plaintiff, registered with the Reemployment Service, and then used on the job.

While endorsing the principle laid down in the *Seeds and Derham* case, *supra*, each case must stand on its own facts. Whether a particular case falls fully within the principles laid down in that case must be decided on the facts of such case as it arises. There is no doubt that in this particular case plaintiff had great difficulty in securing the necessary men who were experienced and qualified to do the heavy construction work called for in this instance. The contract in the *Seeds and Derham* case was executed December 15, 1935, two years after the contract in the instant case. Several provisions were different. Among other things, a new provision was inserted in the *Seeds and Derham* contract requiring the contractor to use not less than 90 percent relief labor, and the reference to defendant's furnishing lists of qualified labor was eliminated.

This brings us to other phases of the case which present themselves in considering plaintiff's effort to secure men who could properly do the work, as well as the requirements,

regulations and restrictions imposed by the defendant which it claimed handicapped it in getting the work done.

It will be noted that the special jurisdictional act refers to rules and regulations not contemplated by the contract and other rules and regulations which were misinterpreted in applying them to the conditions which plaintiff faced.

Both the House and Senate Committee reports on this bill made the following declaration:

> Because of the extraordinary labor conditions surrounding these contracts and the novelty of the rules it seems that the Government misinterpreted the contracts and enforced some of the rules without regard to their proper purpose and in a way inconsistent with the tenor of the contracts. Generally speaking, these rules required the contractors to draw their labor personnel from the vicinity of the projects without regard to the fact that such vicinities were far from cities, sparsely settled, and did not have the skilled labor required for proper performance by the contractors. The contractors complied with these rules but, it is alleged, in many cases had to duplicate the work done by the unskilled men provided by the Government at an excess cost to themselves and, as well, time lost in the training of the labor provided by the Government.

Among the restrictions placed upon the plaintiff by the terms of the regulations imposed by the defendant was that it could not have more than one helper for each form carpenter, sometimes referred to as the 1-to-1 rule. The evidence clearly shows that long prior and up to the time of the execution of the contract in question it had been the universal custom and practice among heavy construction contractors in that area to use as many as 4 helpers to each form carpenter. The evidence also indicates that the so-called 1-to-1 rule was applied more often to house or building construction carpenters, the explanation for the difference being that the nature of the work was entirely different; that the house carpenter builds more for permanence, expecting the work to last many years; that he therefore finishes the joints and other details with great care, having a just pride in his work, whereas the form carpenter constructs more for strength and endurance, knowing that usually within two or three days his forms will be torn up, but that they must

hold while they are in service; that when the work is laid out a great part of it can easily be done with helpers without anything like the direct supervision required on the more painstaking house carpenter work.

It is not necessary for the court to pass upon whether it was a wise labor policy, generally speaking, to have only one helper to each carpenter. These rules grow out of experience and their wisdom can better be determined by those who are skilled in the craft. But whether or not it would be wise to invoke the restrictions of the 1-to-1 rule in this type of work generally, the fact remains that at the time plaintiff bid on this contract, it was given no notice of the possibility of the invoking of this rule. It naturally fixed the amount of its bid on the customs and practices that prevailed in this character of work up to that time. It seems to us that if plaintiff were to be subjected to the increased costs that such a rule, however wise, would occasion, it was entitled, under the terms of its contract, to be told in advance that such a rule was in contemplation, so that it might adjust its bid accordingly. Not having been so warned, we think that one of the purposes of the special jurisdictional act was to compensate plaintiff for the additional costs that would undoubtedly have been included in its bid had it known at the time of making it that it would be subjected to this restriction.

Another restriction placed upon plaintiff was that no helper could do any work unless at the time he was within the sight and hearing of the journeyman-carpenter. The gravamen of plaintiff's complaint is that in heavy construction work this was a wholly impractical rule and that much of the time in this character of work the helper could do nothing at all. It cites one instance where a long rod was run through one of the construction forms. It was necessary for a nut to be tightened on the other end of the rod or bolt, and the helper was stopped because in tightening the nut he would be out of the sight of the journeyman-carpenter. Much evidence was offered to the effect that the rule was so wholly inapplicable to this kind of work that its enforcement made it impractical in most instances to use helpers at all and that consequently it reduced the number to only about half as many as the actual carpenters used; that in an

effort to extricate itself from these difficulties, plaintiff, in the absence of a sufficient number of skilled carpenters found it necessary, as soon as they had had a little experience, to advance helpers to the grade and pay of regular form carpenters, even though not fully qualified or experienced, and to lay off such helpers as showed no aptitude for the work. This caused another difficulty. When the regular qualified and experienced form carpenters found working alongside them men not fully qualified, who had not gone through the mill of experience and training, yet receiving the same rate of pay which they themselves received, they became discouraged. This lowered their morale and to some degree, at least, caused plaintiff to lose control of its organization and interfered materially with its efficiency.

Again, we do not undertake to pass upon the question of whether this was a wise rule, generally speaking, or whether it should be adopted generally in reference to heavy construction work. The fact remains that it was not in effect in this type of work prior to and at the time of the execution of the contract, and plaintiff had no notice thereof. It made its bid in the light of the customs and practices then prevailing. The increased costs thus incurred could not reasonably have been anticipated. We hold this in reference to the facts of this particular case only. If these two rules had been established prior to the time the contract was executed, or if plaintiff had been given notice in advance of the execution of the contract that defendant proposed to establish such rules, an entirely different question would be presented.

Plaintiff complains that on numerous occasions after men had been laid off on account of inefficiency or lack of training and inability to properly do the work, complaints were lodged with the Reemployment Office. When this occurred the respective foremen under whom the men worked would be called to a conference with the men discharged at which representatives of plaintiff, as well as a representative of the Reemployment Service, would be present. The pressure was great and plaintiff frequently tried the men out in other work, restoring and transferring one man three different times. The foremen were called away from their work for

as long as an hour. One foreman was called off the work three times in one day. This left the men to work without the supervising foreman, and naturally interfered with the work of the project.

Conceding, in line with defendant's contention, that the duty of selecting qualified men devolved upon plaintiff and that the defendant was under no obligation except to send over groups of men with their own statements as to their qualifications, the entire responsibility for making selections was thus placed upon the plaintiff. Having disclaimed all responsibility, the defendant should not have repeatedly interfered with plaintiff's exercise of this responsibility and discretion. Its action in this regard undoubtedly increased the cost of performance. Again, we are not passing upon the right of the men to complain, nor of the wisdom of the practice generally of endeavoring to get an opportunity for the men whom plaintiff found wanting. But we have construed the contract in such a way that the entire responsibility for the selection of the men is placed upon the plaintiff. It seems that the defendant should bear the extra expense of this procedure, notwithstanding it may have been the just, wise, and humane thing to do.

On several occasions, when plaintiff had difficulty in securing men of sufficient qualifications and experience to do the work, it asked the privilege of bringing in experienced men that it knew could do the essential work. In some of these instances these requests were granted and in others denied.

On July 21, 1934, the District Engineer, recognizing the difficulty contractors in this area were having in securing a sufficient number of skilled men, wrote the State Reemployment Director the following letter:

> At the present time employment on lock and dam construction in this district is approximately at its peak. As a result, contractors have experienced, under present hiring methods, considerable difficulty in obtaining a sufficient number of skilled carpenters to prosecute the work. Although there are quite a few carpenters in the areas local to the work, a large number of them are not experienced on heavy construction.
>
> The contracts provide that so far as practicable and feasible, labor for the projects shall be obtained through

> the Reemployment Service. Since it appears that contractors are not obtaining, in every case, the type of skilled labor they are entitled to, it seems necessary to waive the provision requiring employment through the Reemployment Service and to permit the induction of carpenters skilled on heavy construction from outside the local area.
>
> For this reason, therefore, I am granting permission to contractors to employ, from outside areas if necessary, a limited number of skilled carpenters, known to them as experienced in heavy construction, as keymen. All men so employed will be required to register at the Reemployment Agency designated for the particular project, so that you will be fully informed as to the extent to which this permission has been followed.

While the policy suggested by the District Engineer was in part complied with, it was not at all times followed.

After many difficulties in securing sufficient qualified labor to properly do the work, the District Engineer in response to a request from plaintiff that it be permitted to bring in an additional number of its own or other skilled employees, declined permission and stated that the plaintiff should use the men of this type already on the job to train additional skilled operators. We quote from this letter:

> 1. It is my opinion that the number of skilled employees exempt from the thirty-hour week as being in the supervisory class, now engaged on P. W. A. projects in this District, who have been permitted to come in to the jobs as key men, is at present sufficient to insure the safe and efficient operation of present equipment. Present personnel of the type described should be sufficient to train additional skilled operators obtained from local reemployment offices on the equipment now on hand or of equivalent type which may subsequently be brought to the work.
>
> 2. It will be the policy, therefore, to require that all additional operators for present equipment or equipment of equivalent type, be obtained from the Reemployment Agencies rather than to be brought in as key men, until such time as it is apparent that there is not sufficient competent local labor available to meet the demands of the various jobs.

Plaintiff complied with this request of the defendant to train the men otherwise lacking the necessary qualifications

so that there might be a sufficient number of qualified men. It proved helpful to both the plaintiff and the defendant, and the work progressed in better fashion after this training was done by plaintiff. However, we are unable to find any provision in the contract which placed upon the plaintiff the duty of training men in order to secure the necessary number of skilled men, and it hardly seems just that the plaintiff should be compelled to bear the expense of the training thus given.

The question of action by the Board of Labor Review on the subject of restrictive regulations is in a rather confused state. There is no evidence of record that the Board ever passed directly upon the question of such regulations. The evidence does show that at the request of the various contractors, including the plaintiff, who constructed locks and dams on the upper Mississippi River and its tributaries during this period, the Board of Labor Review held a meeting at St. Paul on June 28, 1935. Plaintiff offered proof to the effect that the regulations complained of were called to the Board's attention at that meeting and that the Chairman stated that the Board had no authority over the issuance of such regulations, but dealt only with cases. The evidence does not show that any official action was taken. The meeting was held after the instant contract was completed. Plaintiff's representatives were present and participated in the meeting.

There is no proof of record of any further appeal to the Board of Labor Review on the subject of the regulations or of any further presentation of the facts to the Board. The record in this case is silent as to whether the Board of Labor Review ever officially passed upon the propriety of these regulations in any of the cases arising under the special jurisdictional act. In reality the issue in the peculiar facts and circumstances of this case was more a question of the interpretation of the contract than a labor dispute as such.

In this state of affairs the defendant contends that plaintiff failed to take the necessary steps to protect its rights. If this contention were accepted in full, plaintiff would have no more rights under the special jurisdictional act than it al-

ready possessed under the general jurisdiction of the United States Court of Claims. To so hold would be in effect to declare that the Congress did a vain and futile thing when it enacted the special jurisdictional act. We are unwilling to judicially so hold. The special act was manifestly intended, within the limits therein set out, to provide a trial of the case on its merits.

This case arose at a time when the economic conditions in this country were at a low ebb. We had reached the end of an epoch. Business had grown greatly in previous years. Much more of it had become interstate in character and was operated on a larger scale. New methods were being employed. During the previous decade the Government had remained static. It had not kept pace with or shaped its policies to fit the new conditions. Collapse naturally followed. In order to meet this situation the National Industrial Recovery Act and many other acts were put into effect. Changes, too long delayed, were suddenly brought about, and old forms, outmoded and representing outworn creeds, were discarded. New practices were invoked to satisfy the new conditions.

Abrupt changes frequently produce hardships, even though such changes may be wise and necessary. Detours, which are often the sign of progress, temporarily cause difficulties. In passing from old to new methods honest though sometimes mistaken operators are involved in hardships through no fault of their own. This in our judgment is such a case. Congress evidently had in mind the correction of these unjust hardships that arose, however wise the new policies may have been, and accordingly enacted the special jurisdictional act in order to correct the individual wrongs involved in the processes of change.

Certain of the items of damage and excess costs have been very definitely and clearly proven. Others are incapable of exact determination. Plaintiff has submitted a great many figures and calculations which we are unable to accept in full, but which form a basis upon which a just verdict may be found, more or less in jury fashion. Other items of damage are not proven with any degree of definiteness and must therefore be eliminated.

One cannot examine thoroughly the voluminous testimony and numerous documents in this case without being impressed with the fact that plaintiff operated under great difficulties; that it was handicapped in many ways not contemplated by the contract, and was subjected to many hindrances which it could not reasonably have foreseen. Taking all these into consideration, we find that plaintiff's excess costs which are proven with reasonable certainty and for which defendant is responsible, amount to at least $40,000 on this claim.

On the second claim there was an agreement and stipulation with respect to the facts, and no evidence was introduced. Plaintiff had claimed a much larger amount, but in accordance with the agreement this claim was reduced to the amount set forth in the stipulation and it is practically conceded that the damages thus fixed were entirely the responsibility of the defendant. It was so agreed and the agreement is set out in finding 62.

Defendant now, while conceding its responsibility for these damages, nevertheless raises some technical objections to the entry of judgment. These objections are without substance or merit. Judgment will be entered on this phase in accordance with the stipulation in the amount of $16,994.62.

Plaintiff is entitled to recover in the total sum of $56,994.62. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

McCLOSKEY & COMPANY v. THE UNITED STATES

[No. 44003. Decided October 5, 1942. Defendant's motion for new trial overruled February 1, 1943]

On the Proofs

Increased labor costs under National Industrial Recovery Administration Act.—Costs directly resulting from enactment of the act may be recovered, notwithstanding plaintiff's failure to comply with President's Reemployment Agreement or applicable code.

Same; increased costs.—Increased costs indirectly or remotely caused by enactment of act may not be recovered; increased costs resulting in part from the enactment of the act may be recovered to the extent shown to have been caused by its enactment.

Syllabus

Same; provisions of the Act of June 25, 1938.—Where the plaintiff, a contractor, on November 26, 1932, entered into a contract with the Government to furnish all labor and material and to perform all work necessary to construct a Federal building for a stated sum; it is *held* that plaintiff is entitled to recover, under the act of June 25, 1938 (52 Stat. 1197), for increased costs incurred as a result of the enactment June 16, 1933, of the National Industrial Recovery Administration Act (48 Stat. 195), first, by a wage increase for common labor from October 18, 1933, to completion of the contract, and, second, by a wage increase for common labor from January 19, 1934, to completion of the contract; and plaintiff is not entitled to recover for alleged increases in connection with certain subcontracts, where the proof is not sufficient to establish that either the amounts claimed or any determinable portion thereof was the direct result of the enactment of the National Industrial Recovery Administration Act.

Same; President's Reemployment Agreement; code of fair competition for construction industry.—Where contract, entered into November 26, 1932, for construction of a Federal Building provided that all laborers and mechanics employed on the project by the contractor or subcontractors should be paid the rate of wages for such labor prevailing in the community, as provided by the act of March 3, 1931 (46 Stat. 1494); and where the contractor had not, as of October 18, 1933, signed the President's Reemployment Agreement, issued July 27, 1933, under the provisions of the National Industrial Recovery Administration Act of June 16, 1933; and where, nevertheless, the contractor in response to requests for an increase of wages from employees and in accordance with similar increases in the trade in the community, because of the enactment and administration of said act, and in accordance with the policies promulgated in the President's Reemployment Agreement and the proposed code of fair competition for the construction industry, in October, 1933, granted an increase of wages; it is *held* that such increase was the direct result of the enactment of the National Industrial Recovery Administration Act within the meaning of the act of June 25, 1938, and plaintiff is accordingly entitled to recover. *Dravo Corporation* v. *United States*, 93 C. Cls. 734, distinguished.

Same.—Where contractor on January 19, 1934, signed the President's Reemployment Agreement, under the provisions of the National Industrial Recovery Administration Act, and thereupon made a further increase in the wage rate for laborers and mechanics; it is *held* that such increase constituted an increase in costs allowable under the provisions of the act of June 25, 1938, and plaintiff is accordingly entitled to recover.

Same; increased labor costs attributable to the enactment of the National Industrial Recovery Act.—The phrase "increased costs in-

curred as a result of the enactment of the National Industrial Recovery Act," as used in the general jurisdictional act of June 25, 1938, was intended to mean, and does mean, any increased costs which the facts show to the satisfaction of the Court of Claims were attributable in fact to the enactment, existence, administration, and operation, during the period of the claim, of the National Industrial Recovery Administration Act; the allowance of such increased costs is in no way, by any language, express or implied, limited to increased costs so incurred after compliance with, or manifestation of an intention and willingness to comply with, Government requests, rules, regulations or proposed agreements under the National Industrial Recovery Administration Act.

Same; legislative history.—From the legislative history of the jurisdictional act of June 25, 1938, it is *held* that situations and conditions bringing about increased costs such as are involved in the instant case were contemplated and considered by the Congress and were intended to be covered by the language of said act defining the classes of claims for increased costs for which authority was conferred upon the Court of Claims to enter judgment in whole, or in part, if shown in fact to have resulted from the enactment of the National Industrial Recovery Administration Act.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for plaintiff.

Mr. E. L. Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In this case plaintiff seeks to recover $29,239.05 alleged increased costs incurred and paid as a result of the enactment of the National Industrial Recovery Act. This sum is made up of three items, (1) of $13,615.30 increased wages of ten cents per hour paid for common labor from October 18, 1933 to November 3, 1934—of this sum, the amount of $7,369.82 was incurred for the period October 18, 1933 to January 19, 1934, and the amount of $6,245.48 was incurred for the period January 19, to November 3, 1934; (2) of $3,122.75 for increased wages of five cents per hour paid for common labor between January 19, 1934 and November 3, 1934, when the contract was completed; and (3) of $12,500 for alleged increased costs incurred by reason of the failure of a subcontractor to complete his contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Delaware corporation with its principal office in Philadelphia, Penna., is and was at all times hereinafter mentioned engaged in building construction work. November 26, 1932, defendant, represented by the Assistant Secretary of the Treasury as contracting officer, entered into a lump-sum contract with plaintiff as prime contractor, under which the latter agreed to furnish all labor and material and perform all work necessary to construct a Federal building in Philadelphia, known as the Customs House and Appraisers' Stores, in accordance with the plans and specifications forming a part of the contract. Promptly thereafter plaintiff started the performance of the work called for by the contract, the first work being that of demolition and removal of structures on the site by a firm to which plaintiff had given a subcontract for that portion of the work. Plaintiff substantially completed all the work called for by its contract and the same was accepted by the defendant November 3, 1934, and the balance of the lump-sum price stated in the contract, and due plaintiff thereunder, was determined by the defendant November 7, 1934, and was paid.

2. Plaintiff's contract, having been entered into prior to the enactment of the National Industrial Recovery Act on June 16, 1933, contained no provision as to the specific hourly wage to be paid laborers and mechanics, and, in this respect, was a contract then known as a prevailing wage-rate contract under the Davis-Bacon Act of March 30, 1931. The contract contained, as set forth in paragraphs 10 and 11 (d) of the specifications forming a part thereof, the following provisions:

> 10. *Rate of Wage.*—The rate of wage for all laborers and mechanics employed by the contractor, or any subcontractor, on the public building covered by this contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village or other civil division of the State in which the public building is located. In case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall

be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract, as provided in the Act of March 3, 1931 (Public No. 798).

11. (D). It is further expressly understood and agreed that if it should be found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor on the public work covered by this contract has been or is being paid a rate of wages less than the prevailing rate of wages, as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said prevailing wages. In such event, it is understood and agreed that the Government may take over the work and prosecute the same to completion by contract or otherwise, and that the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby.

3. At the time demolition was commenced under plaintiff's contract neither the defendant's contracting officer nor the Department of Labor had fixed the prevailing rate of wages in Philadelphia for common labor and, at that time, some firms were paying as low as fifteen cents an hour and others were paying twenty-five cents an hour for common labor, and in some instances, in the case of certain exceptionally well-qualified laborers, were paying certain individuals slightly more than twenty-five cents an hour, but not as a general rate for common labor. A day or two after plaintiff's demolition subcontractor started work plaintiff learned that the subcontractor was paying fifteen cents an hour for common labor and plaintiff called a conference with the subcontractor on the matter of whether the rate of fifteen cents an hour represented the prevailing rate of wages required by plaintiff's contract. The subcontractor contended that fifteen cents an hour was the prevailing wage rate of common labor. Plaintiff did not think so and, as a result, the plaintiff asked the Secretary of Labor to send a representative to Philadelphia to establish the prevailing rate of wages to be paid under plaintiff's contract. The Department of Labor sent a representative who met with the plaintiff and its subcontractor, and they made a survey of labor conditions in Philadelphia and obtained from the general contractors in

that locality information as to what they were paying for common labor. The information obtained was that wages being paid for common labor in that vicinity generally ranged from fifteen to twenty-five cents an hour. The matter was then discussed with the representative of the Department of Labor with the result that it was agreed between plaintiff and its subcontractor and the Department of Labor representative, that twenty-five cents an hour for common labor was and should be used and paid as the prevailing rate of wages. Thereupon the plaintiff prepared a schedule of wages to be paid on the job under plaintiff's contract, including skilled labor, about which there was no dispute or controversy, and the plaintiff and the representative of the Labor Department went to the site of the work and posted that schedule, which included common labor at twenty-five cents an hour as the prevailing rate of wages to be paid by everyone engaged on the project. Accordingly, plaintiff paid all common labor employed on the work the prevailing rate of wages of twenty-five cents an hour up to October 18, 1933. On October 18, 1933, plaintiff increased the wages of common labor from twenty-five to thirty-five cents an hour and paid this rate until January 19, 1934, and on the last-mentioned date the wages paid common labor were increased from thirty-five to forty cents an hour. Both of these increases were made under and by reason of the circumstances and conditions hereinafter set forth.

4. July 27, 1933, the "President's Reemployment Agreement" form, authorized by section 4 (a) of the National Industrial Recovery Act, was issued. A copy of this standard agreement form is in evidence as plaintiff's exhibit 6, and is made a part hereof by reference. The purpose of this reemployment agreement was to increase the number of persons employed, to reduce the weekly hours of work, and to increase the hourly rate of pay.

Prior to October 14, 1933, the National Recovery Administration, by permission given under Paragraph (13) of the President's Reemployment Agreement form, which was not signed by plaintiff until January 19, 1934, certain provisions of the proposed codes for a large number of trades and industries, including the construction industry, were substi-

tuted for the minimum wage provisions of the President's Reemployment Agreement, including the following:

> Nothing herein contained shall be construed to apply to employees whose rates of wages are established for specific projects by competent governmental authority in accordance with law or with rates of wages established by contracts now in force.

Section 3 of Article III of the Proposed Code of Fair Competition for the Construction Industry provided:

> Where provisions concerning hours of labor or rates of pay have been established for specific projects, by competent governmental authority or agencies (whether Federal, State, or political subdivisions thereof) acting in accordance with law, any employer required to comply and complying with the provisions so established shall be relieved of compliance with any conflicting provisions of this article or any actions taken in accordance therewith.
>
> Any employer required to comply and complying with the provisions of a valid labor agreement in force on the effective date shall be relieved to the extent of his legal obligations thereunder of compliance during the period of such agreement, with any conflicting provisions of this Article, or of any actions taken in accordance therewith.

5. The National Recovery Administration in its Bulletin #3, issued in July 1933, stated on page 10, paragraph 12, that "In some cases the final buyer is the Government, which, under the existing law, is generally not allowed to pay more than the contract price. The President has announced that he will recommend to Congress that appropriations be made to allow the Government to play its part, by paying Government contractors who have signed the agreement [President's Reemployment Agreement] for their increased costs."

6. A code for the construction industry was prepared and recommended to the President by the National Recovery Administration on January 31, 1934, and was approved by the President in an Executive order on the same date. A proposed code under the National Industrial Recovery Act for the construction industry was first submitted to the National Recovery administrator by the Construction League of the United States on August 7, 1933. A hearing was con-

ducted thereon in Washington September 6, 1933. The proposed code was revised during recess of this hearing, and a re-convened hearing was held November 20, 1933. At the conclusion of the hearing in November the National Recovery administrator appointed a committee composed of representatives from the National Recovery Administration and from the interested employer and employee groups and associations to report on the code. Conferences on the proposed code were subsequently held by this committee and the administrator between November 20, 1933, and January 1934, when the code, as adjusted, was recommended. This code is in evidence as plaintiff's exhibit 10-A and is made a part hereof by reference. Under Section 8 of Art. 2 of this code it became effective March 2, 1934. Sections 2 and 3 of this code provided as follows:

> SEC. 2. Where no applicable mutual agreement, as provided in Section 1 of this Article, shall have been approved, employers shall comply with the following provisions as to minimum rates of pay and maximum hours of labor.
>
> A. No employee, excluding accounting, office, and clerical employees, shall be paid at less than the rate of forty (40) cents per hour, provided, however, that the provisions of this paragraph A shall not be construed as establishing a minimum rate of pay for other than common or unskilled labor; and provided further that such provisions shall not be construed to authorize reductions in existing rates of pay. * * *
>
> The foregoing provisions of this paragraph A establish a minimum rate of pay which shall apply, irrespective of whether an employee is actually compensated on a time rate, piecework, or other basis.
>
> B. No employee shall be permitted to work in excess of forty (40) hours per week or in excess of eight (8) hours in any twenty-four (24) hour period, with the following exceptions and limitations: * * *

Before the construction industry code was recommended and approved on January 31, 1934, the National Recovery Administration issued Bulletin #6 on October 14, 1933, entitled "Substituted Wages and Hours Provisions of the President's Reemployment Agreement", which stated, so far as material here, as follows:

By permission of the National Recovery Administration, given under Paragraph (13) of the President's Reemployment Agreement, certain provisions of the proposed codes for a large number of trades and industries have been substituted for certain provisions of the President's Reemployment Agreement. All employers in a trade or industry for which there has been such a substitution may operate under the substituted provisions instead of the corresponding provisions of the President's Reemployment Agreement.

Construction Industry

Minimum wages.—Employers in the Construction Industry shall pay wages—

(a) Not less than the minimum rate of wages for unskilled labor hereby established which shall be not less than forty cents (40¢) per hour unless the hourly rate for the same class of work on July 15, 1929, was less than forty cents (40¢) per hour, in which case the hourly rate shall be not less than that of July 15, 1929, and in no event less than thirty cents (30¢) per hour, and furthermore, in any event * * *

(c) Nothing herein contained shall be construed to apply to employees whose rates of wages are established for specific projects by competent governmental authority in accordance with law or with rates of wages established by contracts now in force.

7. Shortly after the President's Reemployment Agreement form was issued, July 27, 1933, providing for the payment of a minimum wage of 40 cents an hour for unskilled labor, copies were sent to plaintiff and all employers in the construction industry in and around Philadelphia where plaintiff's contract was being performed. At that time plaintiff had completed demolition and excavations, and some of the foundation work, under its contract; a large portion of the construction work under the contract remained to be done. Plaintiff inquired of the Government whether or not there would be any way whereby it could be compensated or reimbursed for the increase in wages for common labor from the prevailing rate of 25 to 40 cents an hour under the President's Reemployment Agreement, if it signed the agreement and paid the increase. Considerable time elapsed before plaintiff could obtain any information one way or the other from the Government officers about the matter.

8. During August 1933 a number of employers engaged in the construction industry in the locality where plaintiff's contract was being performed had signed the President's Reemployment Agreement and increased the wages of their employees. Publicity was given to the matter of increased wages and shorter hours, as a result of the enactment of the National Industrial Recovery Act, the codes, and the President's Reemployment Agreement. As a result there was, thereafter, agitation among the men employed by plaintiff and then being paid the theretofore prevailing rate of 25 cents an hour, and plaintiff's employees asked plaintiff that they be paid more than 25 cents an hour. This situation continued until October 18, 1933, when plaintiff increased the hourly rate of wage being paid for common labor to 35 cents, as hereinafter mentioned, in order to hold its laborers.

9. At that time, in July and August of 1933, John McShain was engaged in building a Naval hospital on South Broad Street in Philadelphia under a contract of February 6, 1933, with the defendant at a fixed price of $2,587,600. The McShain contract was also a prevailing wage rate agreement and he paid the prevailing rate of wage for common laborers of 25 cents an hour until September 14, 1933, after which he paid 50 cents an hour for unskilled labor and $1.20 an hour for skilled labor under the following circumstances:

Section 202 (a) of Title II, entitled "Public Works and Construction Projects", of the National Industrial Recovery Act, approved June 16, 1933, provided that "to effectuate the purposes of this title, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereinafter referred to as the 'Administrator')." The authority and duties of the administrator were defined by subsequent sections, and section 220 of Title II provided that "For the purposes of this act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000." On September 14, 1933, the Chief of the Bureau of Yards and Docks, as contracting officer under the McShain contract, wrote McShain as follows:

By authority of the Federal Emergency Administrator of Public Works, dated September 2, 1933, an allotment of $2,250,000 from funds appropriated for the purpose of carrying into effect the provisions of the National Industrial Recovery Act, has been made to the Navy Department for the construction of the naval hospital at Philadelphia, now in course of erection under Contract NOy–1717. All subsequent payments under the contract (including the payment of $246,946.40) will therefore be made from National Industrial Recovery Funds.

All further operations under the contract will be carried on in conformity with the requirements of the National Industrial Recovery Act and the instructions of the Federal Emergency Administrator of Public Works pursuant thereto. Your attention is called particularly to section 206 of that act, and to the Federal Emergency Administration of Public Works Bulletin No. 51 dated September 7, 1933.

The limitation of labor to thirty hours a week, as contemplated by the statute cited, is already provided for in the contract, which also requires payment of the prevailing rates for labor. The minimum hourly wage rates required to be paid on Federal construction projects in the State of Pennsylvania financed under authority of the National Industrial Act are, as set forth in paragraph 54 of the Bulletin No. 51, $1.20 for skilled labor and fifty cents for unskilled labor. The Bureau understands these rates to apply to work on the site.

It is requested that you keep an accurate record, in such form as to be readily susceptible of verification, of the actual and necessary additional expense for material and labor to which you may be put by reason of the further performance of the contract subject to the requirements of the National Industrial Recovery Act, and submit from time to time to the Bureau through the Fourth Naval District your statements of such additional cost for appropriate action looking to an equitable adjustment on account thereof.

10. As a result of the above letter, an agreement supplementary to the contract of February 6, 1933, was entered into between the Government and McShain, and this agreement provided that all operations after September 14, 1933, under the original contract would be carried on in conformity with the requirements of the National Industrial Recovery Act and the instructions of the Federal Emergency Administrator of Public Works. One of the provisions of the sup-

plementary agreement was that McShain pay fifty cents an hour for unskilled labor and $1.20 an hour for skilled labor. This supplemental agreement is in evidence as Exhibit 21, and is made a part hereof by reference. This supplemental agreement did not specifically stipulate that the Government would pay the contractor or reimburse him for the increase in wages paid as a result of changing the contract to a Federal Emergency Administration of Public Works' project under the National Industrial Recovery Act and Public Works Administration Bulletin #51, but it was stipulated that the contractor would keep an accurate and separate record of the additional costs thereunder. Paragraphs 13 to 16, inclusive, of Art. 27 provided as follows:

> 13. It is mutually agreed and clearly understood that the contractor shall make no claim for reimbursement of excess wages paid as a result of this supplemental contract beyond the difference between the prevailing scale now or hereafter established in the vicinity of the work (as provided for by sections 1–13 of the specifications now a part of the original contract) and the minimum wage scale as fixed by Public Works Administration Bulletin No. 51, or any and all modifications thereof. Where the prevailing wage scale is greater than the minimum wage scale as established by said Bulletin No. 51, or any modification thereof, the said greater prevailing rate shall be paid without claim for reimbursement by the contractor.
>
> 14. That reimbursement to the contractor for wages paid to workmen at the site engaged by the contractor or subcontractors, and necessarily expended as a result of the provisions of Article 18, page 5, of this supplemental contract, as restricted by the provisions of section 13 of this supplemental contract, upon vouchers approved by the contracting officer, will be contingent upon the allocation of additional funds for the payment thereof by the Federal Emergency Administrator of Public Works.
>
> 15. That upon the completion of the work called for by the original and this supplemental contract and formal acceptance thereof by the United States, the contractor will file and prosecute a claim for reimbursement of the additional costs and expense incurred and specified in sections 11 and 12 of this supplemental contract: *Provided*, That nothing herein contained shall operate to prevent the contractor from making and the

Government from entertaining a claim for any additional cost or expense incurred as a direct result of the signing of this supplemental contract.

16. That nothing contained or stated in this supplemental agreement and nothing done or required under its terms shall operate or be held to annul, release, reduce, or otherwise affect the bond attached to the original contract, but the same shall be and remain in full force and virtue in the same manner and like effect as though the modifications herein provided for had been included in and made part of the aforesaid contract at the time of the execution of the same: *Provided, however*, That this agreement shall be accepted, signed, and sealed by the sureties on the bond attached to the aforesaid original contract, and said sureties are hereby made a party to this agreement for the purpose of extending the obligation of said bond to cover the changes herein provided for.

11. April 29, 1935, within six months after acceptance of the final settlement between the Government and McShain under the original contract of February 6, 1933, and the supplemental agreement of November 9, 1933, McShain filed with the Secretary of the Navy his claim under these contracts and the act of June 16, 1934, 48 Stat. 974, for reimbursement of the increased costs incurred from compliance with the National Industrial Recovery Act and the supplemental contract and the claim was approved and allowed for $64,924.45, and that amount was paid. McShain now has pending in this court a suit under the Act of June 25, 1938, 52 Stat. 1197, for recovery of an additional alleged increased cost of $12,270.61, which was not allowed.

12. As a result of the enactment and the administration of the National Industrial Recovery Act and the change in September 1933 of the McShain contract of February 6, 1933, to an Emergency Administration of Public Works contract under the National Industrial Recovery Act, of which plaintiff subsequently learned, other employers and contractors in Philadelphia thereafter commenced paying fifty cents an hour for unskilled labor. At that time plaintiff was paying the previously established wage rate of twenty-five cents. By reason of these conditions plaintiff's laborers continued to ask that the hourly-wage rate being paid to them be in-

creased and threatened to quit if it was not increased. Plaintiff promised and agreed with its employees to pay its laborers engaged on common labor work thirty-five cents an hour, and this rate of wage for all common labor was paid by plaintiff on and after October 18, 1933, and until January 19, 1934. This increase of ten cents an hour in wages paid increased plaintiff's performance costs between October 18, 1933, and January 18, 1934, inclusive, in the amount of $7,369.82, and between January 19 and November 3, 1934, the date on which the contract was completed, in the amount of $6,245.48, a total of $13,615.30 including the resulting increase in workmen's compensation and public liability insurance. This increased labor cost was the result of the enactment of the National Industrial Recovery Act.

13. January 19, 1934, plaintiff signed the President's Reemployment Agreement and on that day further increased the rate of wage for common labor from thirty-five to forty cents an hour under paragraphs 3 and 6 of the Reemployment Agreement. This increase of five cents an hour was paid continuously thereafter until November 3, 1934, when the contract was completed, and the total amount of this increase, with workmen's compensation and public liability insurance, was $3,122.75. This increased cost was the result of the enactment of the National Industrial Recovery Act.

The total of these two wage increases is $16,738.05.

14. January 14, 1933, The Herzog Iron Works, of St. Paul, Minnesota, contracted with plaintiff to furnish all materials and perform all the bronze and aluminum work in the building to be constructed for defendant, for the sum of $32,500. August 8, 1933, The Herzog Iron Works notified plaintiff that it had signed the President's Reemployment Agreement and, pursuant thereto, the cost of performing its contract with plaintiff would be increased $12,500. Receiving no reply, the subcontractor again wrote plaintiff on August 18, 1933, requesting definite advice that plaintiff would pay the increased cost, otherwise it would proceed no further with its work. August 24, 1933, plaintiff informed The Herzog Iron Works that no law required it to pay the additional amount demanded, and the subcontractor in reply on January 26, 1934, stated that it was impossible for

it to continue performance unless plaintiff agreed to pay the additional cost. Plaintiff advised its subcontractor January 30, 1934, that it had signed the President's Reemployment Agreement, subject to "any qualifications as to substituted conditions outlined in National Recovery Administration Bulletin No. 6 * * * particularly that portion * * * relative to the Construction Industry * * *" (see finding 4), and asked to be advised by return mail as to whether The Herzog Iron Works intended to proceed with its contract work. February 1, 1934, the subcontractor informed plaintiff that its continued performance depended on plaintiff's agreement to pay the cost increase of $12,500.

15. Plaintiff, considering its subcontractor's action as a breach of contract, advertised for bids for the completion of the work commenced by The Herzog Iron Works, and Flour City Ornamental Iron Works submitted the lowest bid of $49,000, which was $16,500 in excess of the first subcontractor's price. Plaintiff then attempted to induce The Herzog Iron Works to complete the work for $32,500, which it refused to do. The second subcontractor was persuaded to reduce its price to $45,000, and March 12, 1934, plaintiff entered into a contract with the Flour City Ornamental Iron Works to complete the bronze and aluminum work for $45,000; it completed the work and was paid that amount by plaintiff.

16. Plaintiff did not at the time of execution of their contract require a performance bond from The Herzog Iron Works. Plaintiff sued that company in the Federal Court at St. Paul, Minnesota, for the recovery of $12,500, the difference between the contract prices of the two subcontractors. During the pendency of the suit The Herzog Iron Works applied for the appointment of a receiver; plaintiff then abandoned its suit in the Federal Court and filed a claim in the receivership proceedings for $3,000, upon which it was paid a dividend of 5%, or $150.

17. In the present proceeding plaintiff claims $8,327.77 as increased costs for labor and material incurred in the performance of the Flour City Ornamental Iron Works contract as a result of the enactment of the National Industrial Recovery Act. Plaintiff has failed to prove that in the

absence of the National Industrial Recovery Act, its second subcontractor would have performed its contract for $8,327.77 less than its contract price of $45,000. Nor is it possible to ascertain from the proof the amount of the alleged increased costs for labor and material in the performance of the subcontract. Flour City Ornamental Iron Works was engaged on other contracts at the time it performed its contract with plaintiff. Its pay rolls carried the names of all of its employes without indicating the job on which they were engaged; its shop job cards, from which the man-hours on this job could have been determined, had been destroyed, as was customarily done at certain intervals, and it could not be determined whether the subcontractor had signed the NRA agreement, although there was a general increase in wages by the subcontractor after April 14, 1934. The increased costs to plaintiff in the performance of the subcontract of the Flour City Ornamental Iron Works over the contract price stated in the subcontract with The Herzog Iron Works are not shown by the proof to have been incurred as a result of the National Industrial Recovery Act.

18. April 1, 1935, plaintiff filed with the Comptroller General of the United States its claim for $31,202.57, $18,-702.57 of which represented increased costs for labor on its prime contract and $12,500 increased costs for labor and material on its subcontracts, no portion of which has been allowed or paid.

The court decided that the plaintiff was entitled to recover.

Littleton, *Judge*, delivered the opinion of the court:

Plaintiff sues under the act of June 25, 1938, 52 Stat. 1197, to recover $29,238.05 for increased costs alleged to have been incurred and paid as a result of the enactment of the National Industrial Recovery Act, approved June 16, 1933, in the performance of a contract with the defendant entered into November 26, 1932. This amount is made up of three items: First, a wage increase for common labor on October 18, 1933, from twenty-five to thirty-five cents an hour, which increase, from October 18 to completion of the contract, amounted to $13,615.30; second, a further increase on January 19, 1934,

in the rate of wage for common labor from thirty-five to forty cents an hour, which increase, to date of completion of the contract, amounted to $3,122.75; and, third, a claim for $12,500, or, in the alternative, $9,368.28, which it is alleged arose under the N. I. R. A. in connection with subcontracts with the Herzog Iron Works and the Flour City Ornamental Works.

The third item of the claim must be denied because the proof is not sufficient to establish that either the amount of $12,500 or $9,368.28, or any determinable portion thereof was the direct result of the enactment of the National Industrial Recovery Act. See findings 14 to 17, inclusive.

The other two items, representing increased wages paid between October 18, 1933, and November 3, 1934, require some discussion in connection with the interpretation of the act of June 25, 1938, 52 Stat. 1197, under which the suit was brought and on which the court must base its decision as to whether the plaintiff is entitled to a judgment for all or a part of the $16,738.05, increased wages paid. The facts with reference to these two wage increases of ten cents an hour on October 18, 1933, and five cents an hour on January 19, 1934, showing how the increases came about and why they were made, are set forth in findings 1 to 13, inclusive. In substance the facts established show that plaintiff and the defendant entered into a contract on November 26, 1932, for the construction of the U. S. Customs House and Appraisers' Stores at Philadelphia for a fixed price. This contract contained no provision for a specific wage rate other than that provided by the act of March 3, 1931, 46 Stat. 1494, which required that every contract with the Government in excess of five thousand dollars in amount which required or involved the employment of laborers or mechanics in the construction, alteration, and/or repairs of any public buildings of the United States or the District of Columbia, should contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor, or any subcontractor, on the public buildings, should be not less than the prevailing rate of wages for work of a similar nature in the city, town, or other civil division of a State in which the public build-

ings were located, and a further provision that in case any dispute should arise as to the prevailing rates of wages for work of a similar nature applicable to the contract which could not be adjusted by the contracting officer the matter should be referred to the Secretary of Labor for determination and his decision thereon should be conclusive on all the parties to the contract.

Plaintiff's subcontractor for the demolition work commenced late in 1932 to pay his common laborers fifteen cents an hour, which he contended was the prevailing rate. Plaintiff thought that the rate should be higher and requested the Department of Labor to send a representative to fix the prevailing rate of wage to be paid under the contract. The Department of Labor did so and plaintiff and this representative, after making an investigation and ascertaining that contractors in Philadelphia were paying from fifteen to twenty-five cents an hour, determined that twenty-five cents was the prevailing rate and posted that wage rate at the site of the work. Plaintiff and all its subcontractors paid this rate of wage until October 18, 1933. On June 16, 1933, the National Industrial Recovery Act, 48 Stat. 195, was approved. Until that time, and for sometime thereafter, nothing occurred which required that plaintiff give consideration to the matter of any increase in the rate of wages so determined to be the prevailing rate in that locality. After the enactment of the National Industrial Recovery Act the plaintiff, as well as the other contractors, was asked by the Government to increase the wage rate for common labor to forty cents an hour. Plaintiff did not then agree to do this, its position being that its contract called for payment at the prevailing rate which had been established, and which it was paying, and that if the Government wished to so increase the cost of performance of the contract it should bear the "increased cost". The President's Reemployment Agreement was issued July 27, 1933, and sent to all employers and contractors and they were asked to sign it. This Reemployment Agreement provided in part as follows:

> During the period of the President's emergency reemployment drive, that is to say, from August 1 to December 31, 1933, or to any earlier date of approval of

a Code of Fair Competition to which he is subject, the undersigned hereby agrees with the President as follows:

* * * * *

(3) Not to employ any factory or mechanical worker or artisan more than a maximum week of 35 hours until December 31, 1933, but with the right to work a maximum week of 40 hours for any 6 weeks within this period; and not to employ any worker more than 8 hours in any 1 day.

* * * * *

(6) Not to pay any employee of the classes mentioned in paragraph (3) less than 40 cents per hour unless the hourly rate for the same class of work on July 15, 1929, was less than 40 cents per hour, in which latter case not to pay less than the hourly rate on July 15, 1929, and in no event less than 30 cents per hour.

The Government did not agree to reimburse plaintiff for any wage increase that it had been asked to make and plaintiff did not sign the President's Reemployment Agreement until January 19, 1934, which was shortly before the National Recovery Code for the Construction Industry was approved by the President on January 31, 1934, to become effective March 2, 1934. However, plaintiff, on October 18, 1933, did increase the rate of wage being paid for common labor from the prevailing rate of twenty-five to thirty-five cents by reason of the conditions and circumstances existing and brought about by reason of the enactment and administration of the National Industrial Recovery Act, as set forth in more detail in the findings. When the plaintiff signed the Reemployment Agreement on January 19, plaintiff made a further increase in the rate of wage being paid for common labor from thirty-five to forty cents an hour, and that rate was thereafter paid until the contract was completed. Under the facts and circumstances disclosed in the findings, we are of opinion that these two wage increases represented increased costs incurred as a result of the enactment of the National Industrial Recovery Act within the meaning of the act of June 25, 1938, *supra*. All the facts of record combine to show that these wage increases were brought about and were caused by the enactment of the National Industrial Recovery Act and its administration in the locality where

the plaintiff was performing its contract for the defendant. There is no evidence whatever to show that any material factor, instance, or condition independent of the enactment of the National Industrial Recovery Act entered into the making of these increases other than what it was necessary for plaintiff to do as a part of the general program under the National Industrial Recovery Act which was being put into effect, as far as possible, in the locality where the work called for by plaintiff's contract was being performed.

Counsel for the defendant makes three contentions against the allowance by the court of any portion of the total wage increases of $16,738.05.

The first contention is that plaintiff had not, at that time, October 18, 1933, signed or manifested any intention of complying with the Reemployment Agreement and was not subject to any code so that no Government Regulation acted upon the plaintiff and resulted in the increase which it granted; that the first increase was due to economic circumstances collaterally resulting from the Recovery Act and plainly not a legal result, determined by the usual principles of legal cause and legal liability. (Citing *Dravo Corporation* v. *United States*, 93 C. Cls. 759). The second contention of counsel for the defendant is that "the 1934 and 1938 statutes, [48 Stat. 974 and 52 Stat. 1197] were intended to compensate those who did go along with the Government's program for improving economic conditions and for promoting employment, not for those who held back upon some ground which they regarded as justifiable." The third contention is that no portion of the total amount of $16,738.05 increased wages of 10 cents and 5 cents per hour can be allowed as having resulted from the enactment of the National Industrial Recovery Act because the plaintiff's employees asked for an increase and threatened to quit if an increase was not allowed.

In view of the facts and circumstances of this case and the provisions of the act of June 25, 1938, under which the suit is brought, as we think it should be interpreted, we are of opinion that there is no merit in any of the defendant's contentions and that the plaintiff is justly, fairly, and equitably

entitled under the facts and the provisions of the act of 1938 to judgment for $16,738.05.

The position of counsel for the defendant is clearly a misinterpretation of the act of June 25, 1938, authorizing suits by contractors and entry of judgments thereon for increased costs. In substance, defendant's counsel would have the court so restrict the express and obviously intended broad language of the 1938 act so that it would apply solely to those cases and periods of time where the contractor manifests an intention and willingness to comply with the request of the Government officers for increase in labor wages, or the signing of the reemployment agreement, or manifestation of a willingness and intention of the contractor to comply with the National Industrial Recovery Act program as set forth and provided in the President's Reemployment Agreement form, or an applicable code. In order to sustain the contentions of counsel for defendant and deny plaintiff recovery of the two wage increases on October 18, 1933 and January 19, 1934 it would be necessary for the court to hold and decide (1) that the 1938 statute (52 Stat. 1197) is no broader in its basis for allowance of increased costs, for which Congress intended to assume an obligation for reimbursement, than that provided under and by the act of June 16, 1934 (48 Stat. 974), authorizing settlements for increased costs by the Comptroller General; (2) that in the absence of compliance with the requests of the Government officers concerned, the Reemployment Agreement or a code, or the clear manifestation of an intention and willingness to so comply, any increased costs incurred or paid must be held by the court to have been due to economic circumstances collaterally resulting from the enactment of the National Industrial Recovery Act and, therefore, not caused by or attributable to the enactment of the National Industrial Recovery Act as a legal result, determined by the usual principles of legal cause and legal liability, for, as it is argued, the 1938 statute was intended only for the benefit of those Government contractors who complied and cooperated with requests, proposed agreements, codes and regulations of the Government and not for those contractors who, while they may have substantially increased the wages paid after June 16, 1933, did not fully cooperate

or strictly comply with the requests, proposed agreements, or regulations for reasons which they regarded at the time as justifiable. We are of opinion that Congress did not, in the Act of June 25, 1938, intend that the court should so hold.

An analysis of the acts of 1934 and 1938 for the relief of Government contractors for increased costs incurred by reason of and in connection with the enactment of the National Industrial Recovery Act of June 16, 1933, the legislative history of those acts, and a number of private acts passed by Congress prior to and during the time the act of 1938 was being considered, for the allowance and payment to contractors of increased costs after June 16, 1933, which had been denied by the Comptroller General under the 1934 act, shows that the 1938 act intended, as the plain, obvious and natural meaning of its language discloses, that judgments for increased costs should be allowed and entered where it appears from the evidence that the increased costs claimed or allowed resulted in fact directly from and by reason of the enactment of the National Industrial Recovery Act. In other words, if it appears from the evidence submitted that the whole or some determinable portion of the increased costs claimed may fairly and equitably be said to have been directly attributable to, caused, brought about, or made necessary by reason of the existence of the National Industrial Recovery Act and its administration in the particular locality, such increased costs should be allowed. While it is true, as set forth in section 4 of the 1938 act, that Congress stated its intention that the act should not be interpreted as raising any presumption or conclusion of fact or law but should be held solely to provide for trial upon facts as may be alleged, this expression of intention went no further than to make it clear that contractors should have the burden and the responsibility of establishing by proof satisfactory to the court, that increased costs were incurred after June 16, 1933, "as a result of the enactment of the National Industrial Recovery Act," for which, and in such event, an obligation to pay had been assumed in sections 1 and 3 of the act. The phrase "increased costs incurred as a result of the enactment of the National Industrial Recovery Act" clearly means, and we think was intended to mean, any increased costs which the

facts show to the satisfaction of the court, when considered on a fair and equitable basis, were made necessary and were directly attributable in fact to the enactment, existence, administration and operation, during the period of the claim, of the National Industrial Recovery Act. The allowance of such increased costs is in no way by any language express or implied limited to increased costs so incurred after compliance or manifestation of an intention and willingness to comply with Government requests, rules, regulations or proposed agreements under the National Industrial Recovery Act.

Proof that such willingness or intention existed at the time the increased costs were incurred would establish no different facts so far as cause, effect and result are concerned. It might tend to strengthen the moral phase of the claim, if the allowance or the right or authority of the court to allow the claim depended upon moral considerations. But, as we shall hereinafter attempt to show, Congress has in the 1938 act considered and disposed of any moral phase of the matter and has fixed and declared in sections 1 and 3 the basis for the legal liability, which, in its wisdom, it decided the government should assume. The fact that a contractor was compelled, as the proof shows was the case here, to increase his costs because and as a result of the enactment and administration of the National Industrial Recovery Act when he did not wish to do so because he did not feel that he should bear the increased costs so brought about when he had a fixed price prevailing wage contract previously made, serves to show that such increased costs resulted from the enactment of the Recovery Act. Of course, such an increase in cost, whether willingly or unwillingly made, might be the result of factors too remote to be attributed to the National Industrial Recovery Act, such as we found to be the case as to claim I in *Dravo Corporation* v. *United States*, 93 C. Cls. 734, 759, but that is a matter which relates to the proof and the application of an accepted legal proposition.

Prior to the passage of the act of 1934 vesting jurisdiction in the Comptroller General to determine and allow claims and the enactment of the act of 1938 conferring jurisdiction upon this court to hear, determine, and enter judgment against the

United States upon claims, there was no legal liability on the United States for any increased costs incurred by Government contractors by reason of, attributable to, or resulting from the enactment, operation, and administration of the National Industrial Recovery Act, whether contractors complied or did not comply with the provisions and purposes of that act and the rules, regulations, and requests of the Government officials thereunder. *Horowitz* v. *United States*, 267 U. S. 458, 461. As pointed out in that case, the Government is not liable in its capacity as a contractor for increased costs or damages resulting from its actions in its purely sovereign capacity. But the Congress may, as it did here, consent to be sued for such increased costs on such conditions as it may prescribe and assume an obligation to pay such increased costs, through reimbursement to the contractor by reason of such sovereign act, upon the determination by the tribunal designated, that the facts proven by the contractor fairly and equitably show that the increased cost of performance of a contract previously entered into was the result of, that is, directly resulting from, attributable to, or caused by such sovereign act. That, in our opinion, is what the Congress did when it enacted the act of June 25, 1938, as is fairly shown by the title and all the language in the body of the act. Therefore when the evidence submitted in any case fairly and equitably shows that an increased cost incurred during the performance of a contract was, in fact, directly attributable to the sovereign act in connection with which an obligation to pay is assumed, such increased cost legally results from such sovereign act, and under the language of the act assuming the obligation such increased cost is determinable by the usual principles of legal cause and legal liability. This is so for the reason that in the enactment of the Jurisdictional Act of 1938 Congress has defined in language sufficiently clear as not to admit of doubt, the legal result and the legal liability. The Jurisdictional Act makes the enactment, operation and administration of the National Industrial Recovery Act the legal cause; the incurring of the increased costs shown to have been directly caused by or attributable to the National Industrial Recovery Act, the legal result, and the consent to be sued and the assumption

of a liability to pay, when such cause and result are shown, the legal liability. Thus, the usual standards and principles of legal cause and effect may easily and readily be applied to the legal obligation expressly assumed by the act of June 25, 1938 on the condition specified, namely, the "result of the enactment of the National Industrial Recovery Act."

The foregoing conclusions are, we think, fully supported by the history of the act of June 16, 1934, for the relief of Government contractors whose costs of performance were increased *as a result of compliance* with the National Industrial Recovery Act and the act of June 25, 1938, conferring jurisdiction upon this court to hear, determine, and enter judgment upon claims of Goverment contractors whose costs of performance were increased *as a result of the enactment* of the National Industrial Recovery Act.

It is clear enough that the assumption of an obligation for increased costs conditioned on proof of *compliance* is much more limited than the assumption of a liability and the granting of consent to be sued for increased costs conditioned only on proof that they were the *result* of the *enactment* of the act of June 16, 1933. An increased cost *results* from the enactment of a statute when the existence and administration of the statute in fact directly cause or bring about the whole or a determinable part of such increased cost. It should be noted that the first act in 1934 not only conditioned the allowance of claims to those increased costs which were the result of *compliance* with the National Industrial Recovery Act (and this meant compliance with the requests of the proper Government officers and the President's Reemployment Agreement and approved codes) but it conditioned the allowance of claims to those increased costs which were incurred *after* August 10, 1933, in the performance of contracts entered into prior thereto. The date of August 10, 1933, was fixed for the reason that on that date the President issued a proclamation requiring that all Government contracts thereafter executed should contain a clause stipulating for compliance by the contractors with the President's Reemployment Agreement and the applicable code. The 1934 act further provided that any contractor desiring adjustment and settlement under that act with respect to any such contract

for increased costs incurred after August 10, 1933, by reason of the compliance above-mentioned, should file with the department or administrative establishment concerned a verified claim itemizing such additional costs; that the head of the department or establishment should examine the claim and transmit it to the Comptroller General with his administrative findings of fact and recommendations with respect thereto. Section 2 provided that in no event should any allowance exceed the amount by which the cost of performance of such part of the contract as was performed subsequent to August 10, 1933, was *directly* increased by reason of *compliance* with a code of fair competition or with an agreement with the President. And section 4 provided that no claim under that act should be considered or allowed unless presented within six months after the date of approval of the act or at the option of the contractor within six months after completion of the contract, except in the discretion of the Comptroller General for good cause shown.

This act of 1934 was introduced and enacted as a result of a letter of recommendation from the Secretary of the Treasury to the President of the Senate and the Speaker of the House of Representatives on April 4, 1934, as follows:

> I have the honor to transmit herewith, with recommendation that it be enacted into law, draft of a bill to provide relief to Government contractors operating under codes.
>
> The President, on August 6, 1933, publicly announced through the National Industrial Recovery Administration that he would recommend the enactment of such relief legislation, and, in reliance upon this announcement, many contractors have faithfully performed their contracts rather than seek cancellation thereof. In keeping with this promise, the President, through the executive council, appointed an interdepartmental committee to consider this entire matter and to draft a proposed bill. The bill submitted herewith is the result of that committee's thorough deliberations, and has the committee's unanimous approval.
>
> The bill is intended to afford relief to Government contractors who have loyally cooperated with the President's recovery program by fully complying with the codes of fair competition applicable to their trade or industry or by entering into and fully complying with

the terms of the President's Reemployment Agreement. The bill provides for reimbursing such contractors for the increased costs incurred by them as a result of such compliance. This relief is extended to subcontractors and material men.

The Government is safeguarded by provisions imposing upon the claimants the burden of proving that they cooperated with the President's recovery program, as above stated, and the exact amount of increased costs directly incurred by them as a result. In order to eliminate any possibility of excessive profits, the bill expressly provides that in no event shall any award be made which would result in a net profit to the claimant exceeding 7 percent on the contract in respect of which the claim is made.

Reimbursement is limited to those contractors who made their contracts or submitted their bids prior to August 10, 1933, the date of an Executive order requiring that contracts thereafter executed should contain a clause requiring compliance with the President's Reemployment Agreement or the applicable code, and where the performance took place wholly or in part after that date.

The bill further provides that the President shall establish or designate the agency or agencies to pass upon such claims.

In the administration of the act of 1934 for the settlement of claims by the Comptroller General many claims of contractors for reimbursement for increased costs after August 10, 1933, as a direct result of the operation, the administration and effect of the National Industrial Recovery Act were denied because the contractors making the claims were unable to show that they had strictly complied with the President's Reemployment Agreement, or with an applicable code. Many of these contractors petitioned Congress for relief and reimbursement for such increased costs notwithstanding their failure of compliance, and between August 3, 1937, and June 29, 1938, the Congress passed ten private acts allowing and paying such claims notwithstanding lack of compliance by the contractors.[1] The facts and circumstances existing and

[1] Ch. 560, 50 Stat. 1042; Ch. 561, 50 Stat. 1043; Ch. 615, 50 Stat. 1050; Ch. 184, 52 Stat. 1302; Ch. 329, 52 Stat. 1321; Ch. 346, 52 Stat. 1324; Ch. 663, 52 Stat. 1398; Ch. 670, 52 Stat. 1401; Ch. 783, 52 Stat. 1429; Ch. 826, 52 Stat. 1435.

the committee reports on the claims involved in the private acts mentioned show that the Congress came to the conclusion, after a trial of the act of 1934 with its limitations, that increased costs incurred after June 16, 1933, and *resulting* from the *enactment* of the Industrial Recovery Act should, in justice and equity, be allowed in addition to cost of contract performance after August 10, 1933, which "was directly increased by reason of compliance." Some of these private acts were for the payment of claims of contractors for increased costs "growing out of a contract * * * on account of the National Industrial Recovery Act." Another was for increased labor costs incurred by the particular contractor because other contractors doing similar work in the same vicinity raised their wages to comply with the President's Reemployment Agreement, and the contractor in question was forced to do likewise in order to retain his employees. In the other cases, the contractors had signed the President's Reemployment Agreement but had not strictly complied with it, or an applicable code. In one case (Ch. 615, 50 Stat. 1050) an increase of 10 percent in the wages of factory and office employees was allowed, which increase in wages was the result of collective bargaining after negotiations with employees acting under the provisions of section 7 of the National Industrial Recovery Act. There was also allowed another increase in wages of 6½ percent which resulted from a decision by arbitrators to whom differences between the corporation and its employees had been referred for settlement.

It is true that the enactments of these special acts, paying claims of contractors for increased costs incurred as a result of the National Industrial Recovery Act, have no controlling effect upon the jurisdiction or authority of the court to allow the claim in the case at bar, because the payment of a claim by Congress does not, of itself, give the court jurisdiction to enter judgment upon a similar claim unless it is within the terms of the Act granting consent to be sued and conferring jurisdiction. *United States* v. *McDougall's Administrator*, 121 U. S. 89, 96–102. However, the facts, circumstances, and conditions surrounding the consideration and payment of the claims mentioned in the several private acts,

while the act of June 16, 1934, was in effect and while the act of June 25, 1938, was under consideration, throw considerable light and have an important bearing upon the reason for and the intent and purpose of the act of June 25, 1938, which included all claims for increased costs after June 16, 1933. In effect the act of June 25, 1938, repealed all the provisions of the prior act of June 16, 1934, except those expressly retained, and made the result flowing from the enactment of the National Industrial Recovery Act the basis of the right of the contractor to judgment rather than compliance after August 10, 1933, with the President's Reemployment Agreement or a code, which compliance resulted in the cost of performance of a contract being thereafter directly increased. During the time the claims involved in the several private acts, which were not otherwise allowable under the act of 1934 because there had been a lack of compliance, were being considered, the same Congressional committees had under consideration bills for amendments or changes in the provisions of the 1934 act.

About August 14, 1935, a bill, H. R. 7293, was introduced to amend the 1934 act so as to include within its terms subsubcontractors and materialmen and, also, to provide that if an employer or contractor coming within the provisions of the 1934 act, as amended, *complied* with a National Industrial Recovery Act code effective before August 10, 1933, he should have the additional cost so incurred by reason of such compliance. The last-mentioned proposed provision was found to be inadequate because many of the National Recovery Act codes did not become effective until long after August 10, 1933. The code for the construction industry did not become effective until March 2, 1934. February 24, 1936, a bill, S-4377, was introduced which also had for its purpose the amendment of the act of June 16, 1934, with the additional provisions—first, that upon the rejection, in whole or in part, of a claim by the Comptroller General under the 1934 act this court should have jurisdiction to hear, determine, and render judgment upon such claims in the same manner as provided under section 145 of the Judicial code; and, second, that "The additional cost incurred shall be deemed to be the amount by which the actual cost of performance by the

contractor, subcontractor, or materialmen subsequent to June 16, 1933, exceeded the prevailing cost of labor and material at the time or times the contract was entered into with the United States: *Provided*, *however*, That in no event shall any allowance exceed the amount by which the cost of performance of such part of the contract as was performed subsequently to June 16, 1933, was increased by reason of a code or codes of fair competition, or with an agreement with the President, as aforesaid, *or by reason of the increased cost of labor and materials due to the enactment of the National Industrial Recovery Act*." (Italics ours.) (See Report 2293 of Senate Committee on Education and Labor, 74th Cong., 2d sess., June 1, 1936, on H. R. No. 7293, which was the same as S-4377 with some amendments). It will be seen that this quoted amendment, especially the last clause of the *proviso*, was a material departure from the existing act as to the period and basis for allowance. This quoted proposed change became in substance the basic provisions of the 1938 act. In recommending enactment of the bill S-4377, the provisions of which were later incorporated in H. R. 7293, also recommended by the committee, the Secretary of the Interior in a letter of May 20, 1936, to the Chairman of the Committee on Education and Labor, stated, in part, that "The second change in this connection is an amendment allowing compensation for damages suffered as a result of 'the enactment of the National Industrial Recovery Act' even before the codes or agreements went into effect under that act. If a contractor is able to prove such damage, the equities of his case would seem no different from the equities of cases involving damage suffered as a result of the adoption of and compliance with codes. Whether there exists any adequate or satisfactory basis for determining damage alleged to have been suffered as a result of the mere enactment of the statute, I am not able to say." The problem last mentioned by the Secretary was one which Congress, when enacting the act of June 25, 1938, left to this court with the direction in section 3 that it should be solved "on a fair and equitable basis." The Secretary of Labor recommended the enactment of the new bill S. 4377 April 20, 1936. Its enactment was also recommended by the Administrator of the Veterans' Administration May 21, 1936.

However, the Comptroller General in a letter of April 22, 1936, recommended against its enactment because of the provision for allowance of increased costs as may have been incurred after June 16, 1933, due to the enactment of the National Industrial Recovery Act. In opposing the enactment of the more liberal provisions than were contained in the act of 1934, the Comptroller General said:

> The act of June 16, 1934, did not allow such increased costs prior to August 10, 1933, and it is not clear why it is now proposed to push back the date to June 16, 1933, from which such increased costs may be allowed. As stated, the requirement for compliance with the code or Reemployment Agreements as to contracts thereafter entered into did not exist until the Executive order of August 10, 1933, and there was no requirement that contractors who entered into contracts prior to August 10, 1933, should comply with such codes until after the codes had been approved or the contractors had signed the Reemployment Agreement which was not available for signature until after July 20, 1933 [July 27, 1933]. The codes applicable to the various industries were approved from time to time. There appears to be no good reason why such alleged increased cost should be computed from June 16, 1933, as proposed in the bill, rather than from August 10, 1933, as stated in the act of June 16, 1934.
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> The existing act of June 16, 1934, limits the amount to be paid to such increased costs as were incurred by the contractor or subcontractor performing work or furnishing material or necessary fuel direct to the contractor by reason of compliance with the applicable code or with the President's Reemployment Agreement. Section 2 of the bill would broaden the relief extended by providing that the additional costs incurred shall be deemed to be the amount by which the actual cost of performance by the contractor, subcontractor, or materialman subsequent to June 16, 1933, "exceeded the prevailing cost of labor and material at the time or times the contract was entered into with the United States", with the proviso that in no event should any allowance exceed the amount by which the cost of performance of such part of the contract as was performed subsequently to June 16, 1933, was increased by reason of a code or codes of fair competition or with an agreement with

the President or by reason of the increased cost of labor and materials due to the enactment of the National Industrial Recovery Act. That is to say, the act of June 16, 1934, limits the relief thereunder to the increased costs sustained by the contractor or his immediate subcontractor on and after August 10, 1933, due to his or their compliance with the applicable approved code or the President's Reemployment Agreement, while the bill would go further and allow to the contractor who entered into a contract with the United States prior to August 10, 1933, and subcontractors such increased costs as they may have incurred due to the enactment of the National Industrial Recovery Act of June 16, 1933, and to this extent would impose on the United States such additional costs as the contractor and subcontractor may have incurred due to increased cost of materials, etc., purchased by them alleged to be the result of the act of June 16, 1933.

It is a question of policy whether such broad relief shall be extended to Government contractors, but if such relief is to be extended to Government contractors and their subcontractors it would appear a matter of discrimination not to extend such relief to all contractors, regardless of whether they performed contracts with the United States or for private parties. Heretofore it has not been the policy of the law to extend pecuniary relief to contractors because of the enactment by the Congress of a general statute, as in the enactment of the law the Government operates in a sovereign capacity for which it is not responsible as a contractor or otherwise. If the United States is to depart from such procedure, it is not believed that the benefits in that connection should be limited to those contractors who may have had contracts with the United States and their subcontractors, but should be extended to all contractors who had contracts prior to August 10, 1933, as stated in the act of June 16, 1934, or June 16, 1933, as stated in this bill, and who incurred increased costs by reason of the operation of the act of June 16, 1933.

In a letter of June 8, 1936, recommending the enactment of S-4377, the Secretary of War said:

The contemplated action in allowing a claim for increased costs incurred after June 16, 1933, instead of after August 10, 1933, appears to be meritorious in view of the fact that in numerous instances Government contractors did, in fact, incur increased costs prior to Au-

gust 10, 1933, but were, by the provisions of the former act, precluded from filing a claim for said increased costs.

The provisions of section 2 whereby a contractor may make a claim for increased costs occasioned by reason of a code or codes of fair competition or an agreement with the President or by reason of the increased cost of labor and materials due to the enactment of the National Industrial Recovery Act appears to be far more just and equitable than the similar provision which is carried in the former act. There have been numerous instances where contractors' claims were, under the former act, disallowed on the grounds that the claimant had failed to show that the increased costs were due directly to compliance with an approved code or with the President's Reemployment Agreement. In so disallowing these claims, the Comptroller General placed particular emphasis upon the word "directly." However, a careful examination of these claims by the War Department disclosed that the same were, in fact, meritorious and worthy of consideration under any act the purpose of which was to afford relief to contractors who had incurred increased costs as a result of the enactment of the National Industrial Recovery Act. That is to say, in many cases it was shown that the contractors' increased costs were due to the general increase of prices (caused by the National Industrial Recovery Act or general economic conditions) and not directly resultant to compliance by the particular claimants with the provisions of the President's Reemployment Agreement or applicable codes of fair competition.

None of the aforementioned bills amendatory of the act of June 16, 1934, were enacted during the 74th Congress, but in the 75th Congress there were introduced bills S-3628 and H. R. 10306 which were identical, and S-3628 became the act of June 25, 1938, 52 Stat. 1197, under which this and other similar suits have been instituted. (See Report of the Senate Committee on Claims, #1996, 75th Cong., 3d sess., incorporating House Report #2609, 76th Cong., 3d sess., on H. R. 10306, and a letter of April 21, 1938, from the Secretary of War recommending the enactment of S-3628.) Neither of the bills introduced in the 75th Congress in 1938 attempted to amend the 1934 act but contained the direct provision providing for and authorizing suit in this court and for the allowance of claims for increased costs of performance after

June 16, 1933, as a result of the enactment of the National Industrial Recovery Act. The prior act of 1934 was, therefore, in effect repealed except those provisions of section 4 of the prior act of June 16, 1934, with reference to the filing of claims with the head of the department for such increased costs as were incurred after August 10, 1933, as set forth in the proviso in section 1 of the 1938 act. The committees stated that "The purpose of the bill is to afford relief to such Government contractors * * * whose costs of performance of contracts entered into on or before August 10, 1933, were increased as a result of the enactment of the National Industrial Recovery Act. The Secretary of War pointed out [letter of April 21, 1938] that the present bill is well designed, if enacted without change, to assure justice to all the claimants concerned, while affording reasonable protection of the proper interests of the Government." In his letter of April 21, made a part of the committee report, the Secretary of War pointed out that "Upon enactment of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 195), it became apparent that the effect of that act, and of the codes and agreements to be made thereunder, would be generally to increase the costs of labor and materials, and thus to increase the costs of performance of then pending Government contracts; the resulting manifest moral obligation of the Government to provide for the relief of the contractors against such increased costs of performance was promptly and definitely recognized in principle by the National Recovery Administration, in its Bulletin No. 4, issued in July 1933 * * *. From the viewpoint of those who believe the Government to be morally obligated to make full and equitable reimbursement of the increased costs in question, the act last above mentioned [June 16, 1934] has, in practical operation, fallen short of meeting that obligation * * *. The present bill, if enacted, would in effect largely repeal and supersede the original remedial act of June 16, 1934, *supra*. It would put an end to the authority of the Comptroller General under that act, and confer exclusive jurisdiction upon the Court of Claims * * *. It would eliminate many of the unduly restrictive terms and conditions of the original act, and leave the Court of Claims free

to proceed with the adjudication of claims presented to it, subject only to the broad limitations on its jurisdiction above mentioned, its own rules and customs, and the ordinary principles of justice and equity."

From the foregoing legislative history, it appears very clearly that situations and conditions bringing about increased costs such as are involved in the case at bar were contemplated and considered by the Congress and were intended to be covered by the language of the act defining the classes of claims for increased costs for which authority was conferred to enter judgment in whole or in part if shown, in fact, to have resulted from the enactment of the National Industrial Recovery Act. This legislative history shows that one of the things which Congress wanted to eliminate by the act of 1938 was the specific limitation in the existing law that in no event should any allowance for increased costs exceed the amount by which the cost of performance subsequent to August 10, 1933, was directly increased by reason of compliance with a code or with an agreement with the President. If Congress had intended, as counsel for the defendant insist, that compliance by the contractor, or the manifestation of a willingness and intention of complying with requests of Government officers and with codes or the Reemployment Agreement, we think it is clear, in view of the very careful consideration which the Congressional Committees gave to the matter, that some indication of such a purpose or intent would have been inserted in the act of 1938 or some reference made thereto in the committee reports. We think Congress left out such a limitation on allowance advisedly. The President's Reemployment Agreement form relating to wages and hours of work was not proposed until July 27, 1933, and many of the codes under the National Industrial Recovery Act were not approved until long afterwards. The code applicable to the present case was not effective until March 2, 1934, yet the jurisdictional act confers authority to enter judgments for increased costs from June 16, 1933. Moreover, in enacting in the 1938 act that the basis for the entry of judgment for increased costs should be the "result of the National Industrial Recovery Act", Congress eliminated the word "directly" which had been used in

the prior act of June 16, 1934, in order to avoid the possibility that the court might place thereon the same construction which the Comptroller General had adopted as to the 1934 act, namely, that no allowance for increased costs should be made where other possible factors, economic or otherwise, and too remote to be said to be the result of the enactment of the National Industrial Recovery Act, entered into or affected some portion of the total increased costs incurred and claimed. In other words, Congress intended in the act of 1938 by the use of the broad language "for increased costs incurred as a result of the enactment of the National Industrial Recovery Act," as stated in section 3 of that act, that judgments under the act shall be allowed upon a fair and equitable basis, and notwithstanding any provision of the act of June 16, 1934. That is to say, where the particular contractor incurred increased costs and the evidence submitted fairly and equitably established that a portion of such increased costs could fairly and equitably be said to have directly resulted from the enactment, operation, and effect of the National Industrial Recovery Act the amount of such portion should be determined on a fair and equitable basis and allowed, notwithstanding some portion of the increased costs incurred and claimed may have resulted from, or been caused by, factors, conditions, or circumstances too remote to be fairly attributable to the National Industrial Recovery Act. A study of the language of section 2 of the act of June 16, 1934, shows that this was the real intent and purpose of that act in determining the amount allowable by reason of compliance, but the Comptroller General had not followed it but had held that where there was a lack of *full compliance* with a code or an agreement no amount whatever should be allowed. This condition was fully pointed out to the Congressional Committees. Of course an expense which is the result of an act, and intended to be reimbursed to the contractor, must be the direct result of the act specified, and not merely indirectly or remotely caused or brought about by it. In this respect the act of 1934 relating to compliance and the act of 1938 relating to the enactment of the National Industrial Recovery Act are the same in effect. But increased costs may in part be the

result of the enactment of the National Industrial Recovery Act and in part the result of other causes. Although the whole amount of increased costs for labor and materials may have been brought about and made necessary as a result of the enactment of the National Industrial Recovery Act, the particular contractor may not submit, or be able to submit, sufficient proof to fairly and equitably show that the whole of such expense did in fact so result. But the extent to which he does establish the fact that an expense was a direct result of the National Industrial Recovery Act, he is entitled to judgment to that extent. It was doubtless for this reason that Congress inserted in the 1938 act the provision of section 4 that "This act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged."

The defendant makes a further argument, with reference to the first wage increase of 10 cents an hour on October 18, 1933, that the proviso to Section 1 of the act of June 25, 1938, shows clearly that it was not the intent of Congress in the enactment of the 1938 Act for suits in this court to allow recovery on claims of contractors of a *type* different from the type of claims which could be presented to and allowed by the Comptroller General under the act of June 16, 1934. That since the only type of claims which could be presented and allowed under the 1934 Act were claims "for increased costs incurred by reason of compliance on and after August 10, 1933, with a code or codes approved by the President under Section 3 of the National Industrial Recovery Act of June 16, 1933, or by reason of compliance with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act," it is clear from the *proviso* of the 1938 Act and the legislative history of that Act that Congress did not intend to open up a whole new field of claims nor to authorize allowance of any recovery on claims unrelated to any approved code or the President's Agreement.

This argument of the defendant seeks to read into the proviso to Section 1 of the act of 1938 an exception to the clear language of Section 1 authorizing the court to allow recovery for all increased costs incurred "as a result of the enactment of the National Industrial Recovery Act" so as to

limit the *authority* of the court in any case to allow a claim and enter judgment therefor to only those cases where there had been compliance or proof of an intention or willingness to comply with a code or the Reemployment Agreement. We can find no support for this position in any language of the Proviso or of the Act or its history and we think the contention is answered in the negative by the language of the act of 1938 as a whole.

In the first place, the court cannot read an exception into the provisions of Section 1 of the 1938 Act which precedes the *proviso*, which the language of the proviso does not clearly contain, *United States* v. *McElvain*, 272 U. S. 633, 639; *Fasulo* v. *United States*, 272 U. S. 620, 628; second, the proviso admittedly does not exclude this case from the authority of the court to hear, determine and enter judgment, for this plaintiff did file a claim under the 1934 Act. Third, the proviso must be strictly construed and cannot be extended by implication, and when so construed it is only a limitation on the *jurisdiction* to entertain and consider suits on claims for increased costs by a certain class of contractors,—not a limitation on the *authority* of the court, in cases clearly within its jurisdiction, to allow and enter judgment for *only* those increased costs incurred as a result of compliance. In other words, where the court has *jurisdiction* of the particular case, its *authority* under Section 1, including the proviso, is limited only by the provision that the increased costs must be shown to have been incurred "as a result of the enactment of the National Industrial Recovery Act." When the court has jurisdiction under this provision its authority to allow on the merits extends to any increased cost shown to have been the result of the enactment of the National Industrial Recovery Act whether or not there had been compliance, or an effort to comply, with an approved code or the Reemployment Agreement. We think there is nothing in the language of the proviso that would require or warrant any other conclusion or limitation. Fourth, the only purpose or effect of the proviso, as its language shows, was to limit the consent to be sued to those contractors who had filed a claim with an administrative department concerned in accordance with Section 4 of the act

of 1934 (which had been in effect for a period of 4 years prior to the passage of the 1938 Act) where their contracts had been completed prior to that time, except as to contractors who had incurred increased costs prior to August 10, 1933, and except, also, as to those contractors who had incurred increased costs under contracts which were not completed six months prior to the pasasge of the 1938 Act. It seems plain, therefore, that Congress did not intend by the proviso in Section 1 of the 1938 Act to limit the authority of the court in regard to the basis for the allowance of increased costs on the merits as specifically stated and defined in the enacting provision of Section 1. If the proviso does limit the authority of the court as to the *basis* for allowance in cases within its jurisdiction, i. e., to compliance with an approved code or an agreement, the proviso is in direct conflict with the whole of the enacting provision of the section which precedes it as to the basis for the allowance and if so construed it would substitute an entirely different basis in all cases from that specifically provided in the enacting clause. Defendant's argument on this phase of the case would make it necessary for the court to use two bases for allowances and judgments for increased costs in cases clearly within its jurisdiction; first, in those cases where the contractor has filed a claim prior to the enactment of the 1938 Act, the basis would be "compliance with an approved code or the Reemployment Agreement", and second, in those cases where the contractor had not filed a claim prior to 1938 who had increased costs between June 16 and August 10, 1933, or had increased costs under a contract completed 5 months and 29 days before the enactment of the act of June 25, 1938, or at any time thereafter, the basis for the allowance and judgment would be "the result of the enactment of the National Industrial Recovery Act." The proviso in Section 1 of the 1938 Act plainly does not limit the authority of the court to allow and enter judgment to those *items* of an administrative claim previously filed under the 1934 Act but clearly says that the jurisdiction "to hear, determine, and enter judgments against the United States upon the *claims of contractors*" (italics ours) in cases instituted in this court "shall apply only to such *contractors* whose claims were presented within the limitation period defined in

Section 4 of the Act of June 16, 1934." (Italics ours). Section 4 of that Act which required compliance as a basis for allowance, provided that a claim must be "presented within six months from the date of approval of this Act or, at the option of the claimant within six months after the completion of the contract." Section 2 of the 1938 Act, which immediately follows the proviso in Section 1, provides that suits in this court by contractors upon claims for increased costs incurred as a result of the enactment of the National Industrial Recovery Act "may be instituted at any time within six months after the enactment of this Act or, at the option of the claimant, within six months after the completion of the contract," and (Section 3) that "judgments or decrees, if any, under this Act, shall be made upon a fair and equitable basis, and notwithstanding the *bars* or *defenses* of any alleged settlement or adjustment heretofore made, res adjudicata, laches, or *any provisions* of Public Act Numbered 369 as enacted on June 16, 1934." (Italics ours.) The argument of defendant amounts to an attempt to set up a bar or defense to a part plaintiff's claim *based on the provisions* of the act of June 16, 1934, namely, the provisions of that act, with reference to "compliance", which defense Section 3 of the 1938 Act clearly says shall not be made or considered.

In view of the foregoing it seems obvious that Congress did not intend in the 1938 Act that in suits in this court "compliance" should be the basis for allowance by this court when it expressly stated that the basis for the allowance and entry of judgment shall be "the result of the enactment of the National Industrial Recovery Act." Especially is this true when it is noted, as hereinbefore set forth, that the Secretary of the Interior, the Secretary of War and the Comptroller General, clearly and specifically called the attention of the Congressional committees that considered the bills which resulted in the enactment of the 1938 act to the fact that the provisions of that Act did change the basis for allowances and judgments.

A consideration of the history leading to the enactment of the 1938 Act, a good deal of which has hereinbefore been set forth and discussed in the opinion, shows conclusively, we think, that Congress was not considering a limitation on

the basis of allowance by this court of claims within its jurisdiction when it inserted the proviso to Section 1, but was considering only the fact that it did not desire to open up *de novo* after 4 years, to all government contractors the right to file suits in this court where they had not considered that they had a claim good enough to be filed under the 1934 Act. Congress may limit the consent of the United States to be sued to any class and on any grounds which it may choose, but such limitation on consent cannot be made the basis of the denial of a claim which is otherwise clearly within the terms of the Act and within the jurisdiction of the court. Those contractors who may have incurred increased costs as a result of the enactment of the National Industrial Recovery Act, but who did not file a claim and therefore do not come within the terms and conditions of the consent to be sued as set forth in the act of June 25, 1938, still have their remedy under the First Amendment to the Constitution to petition Congress for redress. By the proviso to Section 1 of the 1938 Act Congress simply reserved to itself the consideration of any claims for increased costs incurred as a result of the enactment of the National Industrial Recovery Act that might be made by contractors whose contracts were completed prior to the enactment of the 1938 Act and who had not theretofore filed a claim.

The proviso appears to have been inserted in the 1938 Act to take care of a situation concerning jurisdiction which had occurred to the Senate and House of Representatives and had been provided for in bills which had been introduced and considered by the Senate and the House in the 74th Congress, having for their purpose amendments to the existing act of June 16, 1934. H. R. 7293, introduced in 1935, amended the 1934 Act so as to include claims of contractors for increased costs from June 16, 1933, instead of August 10, 1933. That Act, amending and reenacting the 1934 Act, fixed the period for filing claims for increased costs to within six months from the date of approval of that Act. H. R. 7293 was passed by the House June 1, 1936. A bill having the same purpose was introduced in the Senate in February 1936 as S. 4377, with the additional provision that allowance for increased costs should include not only costs resulting from

compliance, but also the amount by which the cost of performance of such part of the contract as was performed subsequent to June 16, 1933 was increased by reason of the increased costs of labor and materials *due to the enactment of the National Industrial Recovery Act*. This bill also provided that claims for increased costs by reason of compliance with a code or an agreement of the President or by reason of the enactment of the National Industrial Recovery Act should be presented within six months from the date of the approval of that Act. This bill also contained the additional provision conferring jurisdiction upon this court to hear, determine and render judgment upon any claim which had been rejected in whole or in part by the Comptroller General. The Secretary of War in a letter to the Senate Committee on June 8, 1936, commented favorably on the provisions of S. 4377, especially as to the provision with reference to the allowance of increased costs by reason of the enactment of the National Industrial Recovery Act and the extension of the time limitation as to filing claims and the provision allowing a suit in the Court of Claims on an adverse decision by the Comptroller General. He called attention to the fact that no limitation had been placed upon the time within which a contractor should institute suit in the Court of Claims and suggested that a period of six months be provided. The Senate Committee which considered H. R. 7293, which had passed the House, and S. 4377, then pending in the committee, amended H. R. 7293 to conform to the provisions of S. 4377 and favorably recommended the enactment of the same. As amended H. R. 7293 was passed by the Senate in June 1936 but failed of final passage by both Houses during the 74th Congress which adjourned early in July 1936. In the 75th Congress there were introduced on March 8, 1938, identical bills—S. 3628 and H. R. 10306—the former became the act of June 25, 1938.

From all this it seems clear that by the proviso in Section 1 of the 1938 Act Congress was simply limiting the class of contractors who might sue in this court within six months after the enactment of that Act or within six months after the completion of the contract, and was not limiting and did not intend to limit the *basis* for the authority of the court to

allow and enter judgment to any basis other than "for increased costs incurred as a result of the enactment of the National Industrial Recovery Act." Compare *General Insurance Co.* v. *New York Central R. R.*, 271 U. S. 228, 203; *Sperry Gyroscope Company* v. *Arma Engineering Company*, 271 U. S. 232, 235; *Smith* v. *Apple*, 264 U. S. 274, 278; *Smyth* v. *Asphalt Co.*, 267 U. S. 326, 327, 328. We think that if Congress had intended by the *proviso* to limit the basis for the allowance and therefore the authority of the court to allow and enter judgment in a case within its jurisdiction to some basis other than the "result of the enactment of the National Industrial Recovery Act" as stated in the enacting clause, it would have used some language in the *proviso* to indicate that intention or some reference to it would have been made in the committee reports, because everything that had gone before and everything that existed at that time as to *authority to allow* had been and was based upon "*compliance*", and that was the principal if not the whole reason for the unequivocal change in the basis.

It seems to have been recognized by Congress when enacting the 1938 act that in many cases it could probably not be determined with mathematical certainty that the increased costs of labor or materials were wholly the result of the enactment of the National Industrial Recovery Act. Conclusions can only be drawn from surrounding facts and circumstances. In evident recognition of this the jurisdictional act directs that judgments be rendered on a fair and equitable basis. The mere fact that wages were increased after the enactment, standing alone, might not be sufficient to establish a right to recover. There may have been other contributing factors. However, the fact that wages were increased after the act became a law is admissible as an element of proof. If this is supported by surrounding circumstances and facts, the proof may be sufficient to justify recovery. To hold otherwise and to lay down a hard-and-fast rule that there can be no recovery unless there was a manifestation of an intention, or willingness, by the contractor on and after June 16, 1933, to cooperate and comply fully with the requests of Government officers, the proposed agreements and codes, would result, as pointed out to the committees after the 1934 act

was enacted, in meritorious claims for increased costs being denied which would practically nullify the 1938 statute. Each case therefore must stand on its merits.

As shown by the facts in the case at bar, the original agreement between the plaintiff and the defendant that twenty-five cents an hour was the prevailing wage rate for common labor, the posting of that rate, the subsequent enactment of the National Industrial Recovery Act, the conferences with Federal officials, the mailing out of the President's Reemployment Agreement, the proposed code for the construction industry, the signing of the President's Reemployment Agreement by other contractors in the same locality, the increases in wages made by them, the complaints of plaintiff's employees and their requests for an increase in the rate of wages and their threat to quit unless wages were increased, and the conferences between plaintiff and its employees which resulted in October 1933, in an increase of ten cents an hour, and the clear proof of such increased costs, as well as other supporting facts and circumstances, taken together clearly show and justify the conclusion that the increase of ten cents an hour on October 18, 1933, as well as the subsequent increase of five cents an hour on January 19, 1934, was the direct result of the enactment of the National Industrial Recovery Act. The fact that plaintiff's employees asked for an increase in the rate of pay and threatened to quit if their wages were not increased, after the National Industrial Recovery Act had been enacted and was being administered in the locality, does not require that the increase in wages allowed and paid should be disallowed. The evidence is sufficient to show, and there is no evidence to the contrary, that the demand for the increase and the allowance thereof were brought about and caused by the enactment of the National Industrial Recovery Act and its administration in that locality.

The evidence in *Dravo Corporation* v. *United States*, 93 C. Cls. 734, as the findings show (Count 1, findings 5-16, inclusive), the claimed increased cost of $6,692.95 for additional wages was not a result of the enactment of the National Industrial Recovery Act because other material factors entered into the increase in wages on March 5, 1934, which

exceeded the specific wage rates provided by the applicable code. That case is therefore not controlling here.

Under the facts established by the record in this case and under the broad provisions of sections 1 and 3 of the jurisdictional act of June 25, 1938, the plaintiff is entitled to recover the increased cost of ten cents an hour on October 18, 1933, amounting to $13,615.30, and the increased cost of five cents an hour on January 19, 1934, amounting to $3,122.75. Judgment will therefore be entered in favor of plaintiff for $16,738.05. It is so ordered.

Jones, *Judge;* Whitaker, *Judge,* and Whaley, *Chief Justice,* concur.

Madden, *Judge,* concurring in part and dissenting in part.

I disagree with that part of the decision and opinion which allows recovery of the $13,615 of increased wages paid by plaintiff by reason of raising wages ten cents an hour on October 18, 1933. I do not believe that this raise was a result of the enactment of the National Industrial Recovery Act, within the meaning of the 1938 statute under which this suit is brought.

The issue in this case, as I see it, is a fairly narrow one. It is whether Congress intended, in the 1938 Act, to compensate all contractors with the government for wage increases made by them after the date, June 16, 1933, of the National Industrial Recovery Act, if their contracts had been entered into before August 10, 1933, by which date contractors were on notice so that they could estimate for higher wages when making their bids. I so state the issue because I see no substantial causal relation between the Recovery Act and the wage raise made here that would not exist in any other case in which wages were raised during this period, unless the events in the other case took place in some remote part of the country where the Recovery Act had not been heard of.

The reason plaintiff raised its wages appears from the following testimony of plaintiff's President, on examination by plaintiff's counsel.

> Q. What happened which brought about a raise in the rates? What compelled you to pay more than twenty-five cents?

A. When the N. I. R. A. was passed, all employers were sent copies of that agreement [the President's Reemployment Agreement] to sign, and the agreements called that we would pay forty cents an hour. This building was still in its infancy as far as construction was concerned when the Act was passed; we had completed demolition and excavation and some of the foundation, but the bulk of the work was yet to be done.

We inquired as to whether or not there would be any way we could be compensated for this increase if we paid it; we thought it being an act of the United States Government and we working for the United States Government, and if they thought it was the thing to do, they should lead the way by increasing this work—or for them to make this increase. It took some time before we could find out just what it was they would do.

Along in August a lot of people had signed these things, and they were reading about it in the papers, and there was agitation among the men that they wanted more than twenty-five cents, and we met and agreed to give them thirty-five cents.

Q. At that time what other contract was going on?

A. John McShain was building the Naval Hospital on South Broad Street. He had the same kind of contract we had, as the record will indicate, and he was paying twenty-five cents an hour. I did not know until some time later that the Navy Department changed his contract from one or to the other and made it a P. W. A. contract; that required that he paid fifty cents an hour.

Q. What was the result of McShain paying fifty cents—what effect did that have on labor here in Philadelphia?

A. That started all the rest of the fellows paying fifty cents, and we were paying twenty-five cents, and they threatened to quit, and we promised to pay them thirty-five cents.

Q. And then you continued paying thirty-five cents?

A. Yes; until we signed the N. R. A., when we increased it to forty cents.

Plaintiff asks us to assume that the fact that one contractor, McShain, on one job in a great center of population and industry like Philadelphia, raised the wages of common labor from twenty-five cents to fifty cents was the cause of the agitation and demand for higher wages and threatened strike of plaintiff's workmen. Since, plaintiff argues, McShain raised his wages as a result of the National Industrial Recov-

ery Act, then plaintiff raised its wages as a result of that Act. But I am not willing to make the necessary assumption. I am judicially aware of the general situation throughout the country at the time and of the many and complex forces pushing toward a higher wage and price level. I am not convinced that something akin to what happened to plaintiff would not have happened even though the McShain wage raise had not occurred. Plaintiff's President's own statement that the McShain raise "started all the rest of the fellows paying fifty cents, and we were paying twenty-five cents, and they threatened to quit, and we promised to pay them thirty-five cents" is not a statement of legal cause and legal effect, even if the factual accuracy of the statement be assumed. Why the "other fellows" followed the McShain lead, we are not told. It may have been the general influence of the publicity of the times and the urging of the government. It may have been that the cost of living had risen, so that the twenty-five cent wage would not purchase the necessities of life. It may have been a scarcity of labor in the market. It may have been that, though labor was plentiful, it was withheld from the market by organization and collective action. Whatever the intervening forces were, they seem to have impinged much more heavily on the "other fellows" who gave a twenty-five cent raise, well beyond the N. R. A. minimum, than on plaintiff which gave a ten cent raise, which left its wages still below that minimum.

The situation, then, was as follows. The force of the Recovery Act operated upon McShain. It was transmitted through him to the "other fellows" upon whom, as we judicially know, all the other forces which from time to time cause wages to be raised and contractors' estimates to be disappointed, were at the same time operating. From the "other fellows" this combination of forces impinged upon plaintiff so that when his workmen threatened to strike he raised their wages, not to the standard of McShain and the others of fifty cents, nor to the Recovery Act standard of forty cents, but to thirty-five cents. The decision of the court is that this raise was the result of the Recovery Act, within the meaning of the 1938 Act. It seems to me that all known standards of proximity and remoteness are thereby discarded and that the

1938 Act is, in effect, made to mean that whatever wage raises came after the Recovery Act were the result of it, unless the circumstances were so extraordinary as to be unlikely of occurrence.

I think Congress did not mean to go so far in the Act of 1938. Section 4 provides:

> This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

I think this means that a plaintiff must prove his case according to some known standard of proof; that *res ipsa loquitur* is not to be the rule; and that, of course, *post hoc ergo propter hoc* is not to be the rule.

In the discussion of the reasons why the 1938 Act was passed, the opinion of the court correctly says, *inter alia:*

> In the administration of the act of 1934 for the settlement of claims by the Comptroller General many claims of contractors for reimbursement for increased costs after August 10, 1933, as a direct result of the operation, the administration and effect of the National Industrial Recovery Act were denied because the contractors making the claims were unable to show that they had strictly complied with the President's Reemployment Agreement or with an applicable code.

As I understand the history of the 1938 Act, it seemed unfair to Congress that the Comptroller General had, for example, excluded from relief under the 1934 Act contractors who had, so far as most of their work was concerned, complied, if in any particular they had violated the Recovery Act, and contractors who had in good faith attempted to comply, if in fact they fell short. I see no indication that Congress was moved by sympathy for contractors who had refused to comply, but who had nevertheless been compelled, by threats of strike, to make some adjustment in their wages. That the cases of partial or attempted but imperfect compliance were the ones whose equity appealed to Congress is shown by the proviso in Section 1 of the 1938 Act that:

> * * * this section shall apply only to such contractors, including completing sureties and all subcontractors and material men, whose claims were presented

within the limitation period defined in Section 4 of the Act of June 16, 1934.

This meant that no suit could be brought in this court under the 1938 Act, unless the claimant had filed his claim under the 1934 Act with the contracting department within six months after June 16, 1934, or, at his option, within six months after the completion of the contract, except in the discretion of the Comptroller General for good cause shown by the claimant. If Congress meant, by the 1938 Act, to give a cause of action to a contractor who had no semblance or color of a claim under the 1934 Act, it was, in the same Act, creating a claim and outlawing it by a limitation of time long since expired. It was also doing the inequitable thing of giving enforceable rights to those persons who, though they had not even a color of right under the 1934 Act, had filed timely claims under that Act, while denying recovery to persons similarly or better situated who, recognizing that they had no right under the 1934 Act, had not made the apparently useless gesture of filing a claim. This kind of unjust and accidental creation and denial of rights should not be attributed to Congress. The part of the claim here under discussion is an excellent example of what I mean. When plaintiff raised wages ten cents an hour it was not "complying" with the Recovery Act, either actually, or even partially or colorably. It was refusing to comply with it and was saying that it would comply only when the Government agreed, in advance, to foot the bill. Yet it happened, probably because another part of its claim had apparent merit under the Act of 1934, to file a timely claim on April 1, 1935, within six months after the completion of the contract. Hence, although the Comptroller General could not possibly have allowed this part of its claim under the 1934 Act, plaintiff has the right to sue here. But another contractor, similarly situated, who had given the same raise under the same circumstances, and who had not filed a claim in 1935 because he had no more color of right than plaintiff, would be barred by the limitation in the present Act.

The proper construction of the 1938 Act is not easy. From these several indications of the intent of Congress I would draw the conclusion that the purpose of the 1938 Act was

largely curative; that it was meant to authorize this court to overlook technical defects in compliance; to regard a bona fide though incomplete or mistaken move toward compliance as sufficient, *pro tanto;* to recognize such compliance as in fact occurred even if there was also some violation.

When one supposedly impelled by a force of an intangible nature such as the Recovery Act has refused to give weight to that force, and when all the other palpable forces usually at work to produce a certain result are in action, and when the result produced is not even in accord with the objective of the intangible force, it is, it seems to me, a departure from logic and law to say that the result is produced by the intangible force. I do not believe that Congress intended that we should treat a wage raise as the result of the Recovery Act, when by all standards by which the law has been accustomed to determine legal results, the Recovery Act has not been proved to be the cause. I think that plaintiff's claim for the ten-cent raise comes within neither the equity nor the language of the 1938 Act. I would, accordingly, dismiss it.

FLEISHER ENGINEERING & CONSTRUCTION COMPANY, A CORPORATION, AND JOSEPH A. BASS, AN INDIVIDUAL, TRADING AS JOSEPH A. BASS COMPANY, v. THE UNITED STATES

[No. 45010. Decided October 5, 1942. Defendant's motion for new trial overruled February 1, 1943]

On the Proofs

Government contract; decision of contracting officer, finality of.—Contracting officer's decision on whether or not excavation is done to solid bearing is final where made in good faith. *John McShain, Inc.* v. *United States*, 308 U. S. 512, 513, and cases there cited.

Same; extra work; failure to protest within ten days.—Where defendant's inspector ordered plaintiff to do work which plaintiff insisted was not within the contract, and plaintiff protested and continued to protest for several months, but finally did some of the work and did not protest until 13 days after entering upon the work, it was *held* that the work required was in fact extra work and that plaintiff was entitled to recover, notwithstanding protest

was not made until 13 days after demand, since plaintiff did not enter upon the work until after protest had been filed.

Same; protest.—**That plaintiff may not recover because work required of it is alleged to be an extra unless protest is filed within 10 days after demand is made, has no application to a case where protest is filed prior to entry upon the work by plaintiff, although not within ten days after demand was made.**

The Reporter's statement of the case:

Messrs. Robert C. Handwerk and *Dean Hill Stanley* for plaintiffs. *Mr. Joseph R. McCuen* was on the brief.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea* for the defendant.

The court made special findings of fact as follows:

1. Plaintiff Fleisher Engineering and Construction Company is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business in the city of Buffalo, New York. Plaintiff Joseph A. Bass is an individual doing business under the name and style of Joseph A. Bass Company, and has his principal place of business in Minneapolis, Minnesota.

2. On July 14, 1936, plaintiffs jointly entered into a contract with the defendant whereby the plaintiffs, in consideration of the payment to them by the defendant of $3,999,400, agreed to furnish all labor and materials and perform all work required for the construction of the superstructure for Kenfield Housing project in Buffalo, New York, in accordance with specifications and drawings which were referred to in and made a part of the contract. The contract required the construction of 76 houses, some of two stories and some of three stories, and a powerhouse and community building.

3. The basements for the buildings had been excavated and the foundation walls constructed by another contractor, but plaintiffs' contract required them to construct a concrete basement floor to connect with the foundation walls, and required them also to construct the front foundation walls for the rear and front stoops or porches to the buildings.

4. Plaintiffs received notice to proceed on or about July 22, 1936, and immediately began work on the project and proceeded thereafter with the construction of the buildings.

5. The contract contained, among others, the following provisions:

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the Contracting Officer and the price stated in such order.

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

The specifications, referred to in and made a part of the contract, contained the following provisions:

GENERAL CONDITIONS

SEC. 10. INTERPRETATIONS, PROTESTS.

1. The decision of the Contracting Officer as to the proper interpretation of all Drawings and the Specification shall be final, subject only to appeal in case of dispute, as provided in the Contract. Materials or work specified herein in words which so applied have a well-known technical or trade meaning shall be held to refer to the particular standards which such words imply.

2. No complaint on the part of the Contractor that work demanded of him is outside the requirements of the Contract Documents, or that any record or ruling of the Contracting Officer is unfair, shall be considered or entertained unless a protest is submitted in writing to the Contracting Officer within ten days after receipt of demands for such work or of such record or ruling stating clearly the basis of the Contractor's objections. Unless the Contractor files such protest as above provided, he will be deemed to have accepted,

and shall be conclusively bound by, such demand, record, or ruling.

SPECIAL CONDITIONS

SEC. 8. EXISTING CONDITIONS

* * * * *

3. It shall also be the duty of the bidder to visit the site of the work and to fully acquaint himself with conditions as they now exist. * * *

5. *General responsibility.*—It shall be the responsibility of the Contractor under this contract immediately upon the turning over of the site or any portion thereof to him to examine the work already performed on the site and in the event there are any discrepancies existing at that time between the work actually done and the work called for under the Foundation Contract the Contractor shall immediately advise the Contracting Officer of any such discrepancies before starting any part of the work called for under this Contract. * * * * * * Failure of the Contractor to notify the Contracting Officer within fifteen (15) days after turning over the project site or any section thereof to the Contractor that the foundation work done under the Foundation Contract is not in accordance with the Foundation Contract will be deemed conclusive evidence that the work called for under the Foundation Contract has been performed in accordance with that contract. * * *

DIVISION 1. EXCAVATING, FILLING, AND GRADING

SEC. 6. EXCAVATING.

1. The excavations shall be of the depths and sizes required for the work indicated on the drawings. Footing trenches in earth shall be excavated to allow for side forms. The Contracting Officer will make an inspection of excavations when the required depths have been reached and if the conditions disclosed are not satisfactory, will instruct as to procedure. Test holes may be required but will be paid for as an extra.

* * * * *

DIVISION 3. MASONRY

CONCRETE WORK

SEC. 13. WALLS.

1. All concrete walls shall be made waterproof and guaranteed to be free from leakage during the period

of the performance bond. Integral waterproofing shall not be used, but the Contractor shall, by properly mixing, depositing, and puddling or vibrating the concrete, insure a waterproof concrete. Should any leakage develop in the concrete walls this concrete work shall be waterproofed on the interior, as often as is necessary to prevent leakage during the period of the performance bond by the Contractor, who shall use such method of waterproofing as is approved by the Contracting Officer.

2. Construction joints in concrete walls shall be lock joints of V shape, with the V being not less than 4 inches deep. Before the concrete work of any succeeding section adjoining any such construction joint is poured, the portion of the joint already in place shall be picked, brushed clean, and given a coat of neat cement grout.

3. Horizontal joints shall not occur in walls, except where shown on the drawings.

4. All joints shall be made absolutely watertight.

SEC. 14. FLOOR SLABS ON GROUND.

* * * * *

8. All concrete slabs on ground in basements, except pipe space slabs, shall be made waterproof, guaranteed to be free from leakage and waterproofed as often as necessary to prevent leakage during the period of the performance bond in conformity with such requirements hereinbefore specified for walls except that it will not be required to make the 3″ deep joints in slabs tight against leakage.

6. Sheet A–78 of the architectural drawings provided that the front foundation walls of the front and rear stoops or porches should extend to a minimum depth of four feet below finished grade, and at least six inches below present (original) grade. Sheet S-322 of the structural drawings provided, in addition, that the front walls be carried down to solid bearing.

7. Plaintiffs excavated to the four-foot minimum below finished grade and were preparing to put in forms and pour the concrete, but defendant's project engineer insisted that such excavation would not carry the foundations to solid bearing, and required plaintiffs to excavate to a greater depth varying from 0.26 feet to 4.81 feet in order to reach

what was, in his opinion, solid bearing. This work was carried on from October 1 to November 15, 1936.

8. The area of the project site was of hard clay close to the surface of present grade, with the exception of the area upon which from four to six of the houses were constructed, which had been filled in with cinders, trash, and rubbish. Plaintiffs had knowledge of the condition of the soil by borings shown on contract drawing S-300-A-X, which clearly depicted the actual conditions on the site. This condition was also readily discernible by its appearance.

9. The foundation walls for the front and rear stoops were within a few feet of the foundation walls for the main building, the latter of which had been constructed by another contractor. This contractor had excavated for the foundation walls of the main building to a greater width than usual. This resulted in depriving the foundation walls for the front and rear stoops of any lateral support unless they were carried to a greater depth than the four-foot minimum provided for in the architectural drawings above referred to.

After plaintiffs had inspected the work done by the foundation contractor, as they were required to do by paragraph 5 of section 8 of the specifications, they wrote the project engineer on August 8, 1936, setting forth certain discrepancies between the work actually done and that provided for under the foundation contract, but no claim was therein made that the foundation contractor had excavated to a greater width for the foundations to the main buildings than he was required to do by the contract, or than he should have done according to good construction practice.

10. This work was completed on November 15, 1936, but plaintiffs made no protest in writing against excavating for these greater depths until December 16, 1936, when they addressed the following communication to the contracting officer:

> Subject: Proceed Order for Extra Concrete in Entrance Walls.
>
> Today we submitted to the Project Engineer our Proposal #39 amounting to $16,787.83 for excavating 976 cubic yards of earth and installing 325.33 cubic

yards of extra concrete in entrance walls. We also submitted complete data showing exactly where the extra concrete was poured. For your information, we are attaching two sets of data sheets with sixteen sheets per set. "Actual Elevations of Front Wall" have been taken from the disinterested engineers' regular certificates as previously furnished to the Project Engineer.

We have not received a formal Proceed Order covering this work but we have received verbal orders to lower the footings to the elevations as shown on the accompanying data sheets. We hereby request that a Proceed Order be issued and our proposal accepted. Reasons for these requests are given in the following paragraphs.

Architectural Drawing #78 showing details of exterior entrances definitely establishes the grade to which the front entrance walls are to extend. The sections through the entrances show that the front walls of entrances are to be installed at an elevation of four feet minimum below finished grade and at least six inches below present grade. All the architectural drawings showing the elevations of the buildings indicate that the present grade is at least six inches above the four-foot minimum shown on architectural drawing #78 and therefore the bottom of the front entrance walls are definitely established at a grade four feet below the finished grade.

Structural drawing #312 [322] states that the front entrance walls shall be carried to solid bearing. Our interpretation of this note is that if we do not come to solid bearings at the grade shown on the architectural drawings; namely, four feet below finished grade; we are prevented from installing these walls until such time as the contracting officer inspects the soil.

Your attention is called to the fact that the architectural drawings showing the front entrances is drawn to a scale making it two times as large a drawing as the structural drawing showing the walls. Therefore, sections on architectural drawing #78 should have precedence over sections on structural drawing #312 [322].

On Page 60 of the Specifications, Division 1, Section 6, Paragraph 1 states that "the contracting officer will make an inspection of excavations when the required depths have been reached and if the conditions disclosed are not satisfactory, will instruct as to procedure." When the excavation was performed for these entrances, the inspector inspected the excavation and

ordered the front walls to be carried to lower depths than shown on the drawings in order that the front walls rest on solid bearing.

It is evident that the designer of the concrete walls of the entrances was attempting to save all concrete where possible by indicating walls only 4′–0″ deep, but at the same time he realized there was a possibility these walls might have to go deeper to be structurally safe. We do not believe it was ever the intention that the contractor should make an allowance in his figures for increasing the depth of these walls over the minimum. In some cases this works out to be an increase of over 100%. We can assure you that our contract price has not included any allowance for work below the 4′–0″ minimum depth shown for porch walls.

We respectfully request that you accept this proposal and issue a Change Order covering the extra work.

On December 18, 1936, C. Leslie Wier, Project Engineer, replied by letter to the plaintiffs, acknowledging their letter of December 16, 1936, and advising that the Inspection Division had no authority to issue proceed orders, and stating that the proposal was being forwarded to the Project Manager.

In reply to plaintiffs' letter of December 16, 1936, the contracting officer wrote plaintiffs on December 23, 1936, as follows:

Your attention is called to Structural Drawing No. 322, showing in detail the entrance walls for entrances Y′, T′, W′, X′, U′, and Z′. On all of these details the following note with reference to the front wall appears, "carry down to solid bearing." Further reference should be made to Architectural Drawing No. 78, "Typical Front and Rear Entrance Details," which indicates that a minimum dimension of four feet shall be maintained for the front and side walls, and notes "front walls are to extend at least six inches below present grade."

After consideration of the above, it is my interpretation that you have not been required to exceed the terms of the contract and I cannot authorize the issuance of the requested proceed order.

11. Thereafter plaintiffs appealed in writing from the decision of the contracting officer to the head of the depart-

ment, whose authorized representative affirmed in writing the contracting officer's decision, upon the ground that plaintiffs had performed no work beyond contract requirements. Of this action plaintiffs were duly notified.

12. The defendant in no instance required plaintiffs to excavate to a greater depth than that which, in the opinion of the contracting officer or his duly authorized representative, was sufficient to reach solid bearing, except that plaintiffs were required to excavate in all cases to the four-foot minimum required by the architectural drawings and to not less than six inches below present (original) grade.

13. Plaintiffs' claim that they were required to expend for excavation not required by the contract and for additional concrete the sum of $16,787.83, itemized as follows:

Concrete work	Quantity	Unit price	Material	Labor	Total
SUMMARY					
Concrete Work	$12, 941. 48				
Excavation	2, 320. 18				
	15, 261. 66				
General Contractor's Commission 10%	1, 526. 17				
Total extra	16, 787. 83				

CLAIM FOR EXTRA WATERPROOFING

14. At the time of submitting bids for the contract work, plaintiffs, in accordance with instructions, submitted an alternate bid which omitted subsoil drains to be installed around the perimeter of all buildings. The defendant accepted this alternate bid which eliminated the installation of subsoil drains by plaintiffs and decreased plaintiffs' contract price approximately $22,000. The purpose of these subsoil drains was to carry away subsurface water that might accumulate at the bottom of the foundation walls.

15. In the spring of 1937, when approximately 80% of the plaintiffs' work had been completed and approximately one-third of the basement slabs had been poured, leaks, admitting water, developed in certain of the buildings at the joints

where the perimeters of the basement slabs abutted the foundation walls which had been constructed under another contract by a different contractor.

On March 13, 1937 defendant's construction engineer on the job wrote to plaintiffs as follows:

> With reference to the basements in various buildings where the floor slabs have been completed, please refer to Page 76 of the Project Specifications, Paragraphs 1 and 4 of Section 13, and Paragraph 8 of Section 14.
>
> As you will observe, the floors are leaking to a considerable degree, generally in the joint between the basement floor slab and the walls.
>
> As the correction of this is particularly emphasized in the above paragraphs, we respectfully request that you make such arrangements as are necessary to remedy the defects.

On March 26, 1937 plaintiffs wrote to defendant's project engineer quoting a letter from plaintiffs' subcontractor refusing to do the waterproofing to the said joints and insisting that the waterproofing was not required under the contract between plaintiffs and defendant. This letter states:

> We have written to the Easthom-Melvin Co. on the above subject and they replied to us under date of March 22nd, as follows:
>
> "We wish to acknowledge receipt of your letter dated March 19th in reference to waterproofing leaks in proportions [sic] of basement floor slabs where they contact walls. In this connection we wish to advise you that we do not interpret the specifications to require us to waterproof the joint between the basement floor slab and walls. The specifications are specific in that the three-inch deep joints on column centers need not be tight against leakage. Therefore, it is impossible to assume that we should be asked to waterproof the joint between basement floor slab and wall when the details show an open joint.
>
> "It is our interpretation of Section 13 of the specifications that any leakage in the walls which may occur due to cracks or poor concrete would have to be made absolutely watertight. Inasmuch as we did not install the exterior concrete walls, it is not a part of our contract to make these walls waterproof.
>
> "We interpret Section 14, Paragraph 8, the same. Any leakage due to cracks in the floor other than at the

three-inch deep joints and between basement floors and foundation walls will be made waterproof by us. We believe that the government expected water to seep through at the joint between the basement floor and foundation wall as well as at the three-inch deep joints. If not, they would have made other provisions in designing a waterproof joint."

We respectfully request your consideration of the fact that the specifications on this project do not require that the basement floors be entirely free of water seepage.

On March 27, 1937, defendant's project engineer wrote to the plaintiffs as follows:

> This is with reference to your communication dated March 26th, subject "Waterproofing of Leaks in Basement Floors."
>
> We have carefully considered the statements made by your subcontractor, The Easthom-Melvin Company, and in reply state that the portions of the Specifications quoted in previous communications regarding requirements of the Contract, are very specific and are not based on supposition as stated by your subcontractor in the last paragraph of his communication. The work in its present state is unsatisfactory and not acceptable to this office, and until these cellars are waterproofed, a 100% payment on account of concrete work cannot be made.

On April 14 and April 23, 1937 defendant's project engineer made further demands upon the plaintiffs that they waterproof these joints.

Finally, plaintiffs, by their employees and through Troup Engineering Company, began waterproofing these joints on July 1, 1937, and continued thereon until August 20, 1937, when they refused to proceed further with this work.

16. Defendant's project engineer, however, continued to insist that plaintiffs resume this work, but plaintiffs protested that they were not required to do so under the contract. Finally on October 26, 1937 defendant's project engineer wrote plaintiffs a letter which reads as follows:

> This is to confirm recent conversation with your office regarding basements in which dampness and water have occurred in large quantities. We refer specifically to Building 4 in Block III, as being exceptionally unsatisfactory.

There are other locations both on Oakmont and Hempstead Avenues which require attention, and it is suggested that you make a thorough examination of each and every basement, in order to comply with the project specifications (see Page 76, Section 13, Paragraph 4, and Section 14, Paragraph 8).

In reply plaintiffs wrote the contracting officer on October 27, 1937 as follows:

> We have at various times been directed by the Project Engineer to free basements of all buildings on the Kenfield Project from dampness and water resulting from a leaky joint between the basement slab on the ground and the basement wall installed by the Foundation Contractor under another contract. We, as well as our subcontractor—Easthom-Melvin Company—before proceeding with the waterproofing of said joint, on several occasions went on record to the effect that it was our opinion that the Project Specification did not require us to waterproof the joint around the inside perimeter of the basements.
>
> We were, however, compelled to proceed with this work and did so under protest, and we have now expended a large sum of money for this work and you will receive from us within the next day or two a claim covering this total expenditure.
>
> Under date of October 26 the Project Engineer again called our attention to the fact that certain basements on this project are still leaking and has requested that we proceed to waterproof same.
>
> * * * * *
>
> The purpose of this letter is to acquaint you with the fact that we will file a claim within the next day or two covering work performed by us in connection with the waterproofing of joints around the perimeter of interiors of basements. It is also our desire that this matter be reviewed, with the idea in mind of exonerating us from expending any further moneys in connection with waterproofing of said joint, which additional work is now being requested by the Project Engineer.

On October 29, 1937 plaintiffs submitted in writing their claim for work and material in the sum of $8,344.21.

17. The contracting officer replied under date of November 8, 1937 advising that he had no record of having authorized such work, calling attention to article 5 of the contract, providing "No charge for any extra work or material will

be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order," and calling upon plaintiffs for further information.

On November 11, 12, and 20, 1937, plaintiffs wrote the contracting officer furnishing information and a sketch showing the method used in waterproofing and the buildings to which waterproofing was applied.

On November 23, 1937, the contracting officer requested plaintiffs to submit to the project engineer "in the form prescribed for the submission of proposals, a complete itemization as to the amount of expenditure for the work performed in each building with unit prices and all substantiating evidence relative to the method employed and the conditions under which the work was performed."

18. By letters dated November 27, 1937 and November 29, 1937 plaintiffs complied with the request of November 23, 1937 (finding 17), and submitted the itemized claim with invoices and other supporting data, except that the claim was amended to claim only $8,131.73.

19. During this time plaintiffs were advised by a field officer of defendant that the contracting officer had decided that the waterproofing was not a requirement of the contract.

20. The defendant finally paid plaintiffs the contract price for the work in full without deduction for the cost of completing the waterproofing, but it did not pay plaintiffs for the waterproofing already done. In accepting this payment plaintiffs reserved the right to make claim for the labor and material expended on the waterproofing already done.

21. Under date of January 31, 1938 the Acting Director of Federal Construction Projects rejected plaintiffs' claim, and upon appeal the Administrator of the United States Housing Authority, Department of the Interior, on March 16, 1938 affirmed the decision of the contracting officer.

22. Plaintiffs undertook to make these joints waterproof by cutting a raglet at the joints and filling it in with cement and ironite waterproofing and rounding it out. Thereafter, from time to time, plaintiffs added coats of cement and ironite composition at places where leaks recurred, intending to continue this practice until the leaks had been completely stopped.

After plaintiffs had discontinued doing any further waterproofing leaks continued to appear, and defendant directed its project engineer to himself undertake to stop the leaks. This he did by cutting out and reopening all of the raglets cut by plaintiffs and inserting therein a composition of his own. Defendant, however, left untouched and utilized approximately 3,792 feet of the waterproofing done by plaintiffs.

The proof does not show that the work of waterproofing done by plaintiffs was faulty if the program adopted by them had been continued.

23. There is no provision in the contract or in the specifications which required plaintiffs to waterproof the joints around the perimeter of the basement slabs where they joined the walls.

24. Plaintiffs expended the sum of $8,131.73 in waterproofing these joints between the basement slabs and the foundation walls, itemized as follows:

Item	Amount
Labor Cost to Fleisher Engineering & Construction Co. and Joseph A. Bass Company	$1, 291. 67
Workmen's Compensation & Public Liability Insurance, 6.97% on $1,291.67	90. 03
Material used by men employed by Fleisher Engineering & Construction Co. and Joseph A. Bass Company	113. 25
	1, 494. 95
General Contractor's Overhead, 10%	149. 50
	1, 644. 45
General Contractor's Profit, 10%	$164. 45
	1, 808. 90
Social Security Tax, 1% on $1,291.67	12. 92
	1, 821. 82
State Unemployment Tax, 2% on $1,291.67	25. 83
	1, 847. 65
Work performed, under subcontract agreement, by Troup Engineering Co	5, 712. 80
General Contractor's Commission, 10%	571. 28
Total	8, 131. 73

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiffs jointly entered into a contract with the defendant to construct the superstructure of a number of buildings known as the Kenfield Housing Project. The basement already had been excavated and the foundation walls had been constructed by another contractor. Plaintiffs allege they were required to do work not required by the contract and that they have not been paid therefor. For this alleged extra work they sue.

I

The first extra is for alleged additional excavation and additional concrete in constructing the front foundation walls of the back and rear entrances to the buildings. Plaintiffs claim they were required to excavate to a greater depth than that called for by the contract and specifications, and that this necessitated additional concrete.

The architectural drawings required that the front foundation walls of these entrances should extend to a minimum depth of 4 feet below finished grade and to at least 6 inches below the present or original grade. The structural drawings required that these walls be carried down to solid bearing. Plaintiffs originally contended that their contract required them to go no deeper than the depths fixed in the architectural drawings, to wit, 4 feet below finished grade, and not less than 6 inches below present or original grade, and that if it was necessary to go deeper in order to reach solid bearing, additional compensation therefor would be paid. However, they now have abandoned this position and admit they were required by the contract to go to solid bearing. This is obviously correct.

Their present contention is that they were required by defendant's representative to go not only to solid bearing but below it. There is some conflict in the proof on this point. Defendant's project engineer testified definitely they were not required to go below solid bearing. A Mr. Knight, employed at the time of giving his testimony as a construc-

tion superintendent by John McShain, Inc., but employed on this project in a similar capacity by the plaintiffs, testified that, except in the case of three or four buildings, solid bearing was reached at six or twelve inches below present grade, and in many cases long before they reached the four-foot minimum. (Plaintiffs claim the defendant required them to go to depths below the four-foot minimum varying from 0.26 feet to 4.81 feet.) Mr. Helsing, who was the president of the Easthom-Melvin Company, the subcontractor doing the concrete work, testified that, except in the case of from four to six buildings, solid bearing, in his opinion, was reached before the four-foot minimum depth was reached. Mr. Helsing, however, says:

> I would say, in most of these cases, that the solid bearing was at the four-foot minimum, but he [the inspector] was naturally going to be sure of himself, and very naturally carried the thing down to a point where he was positive that there was solid ground. As I see it, it is a matter of interpretation of what is solid ground, where the solid ground is and in some of these cases we could have filled a lot and been on solid ground, but in the inspector's interpretation it would not have been on solid ground, and he thought the drawings could have made it go down any depth, due to this minimum requirement of solid bearing. He contended throughout that he could require it to be carried to any depth which, in his opinion, would be solid ground.

He sums the case up by saying that it was a matter of a difference of opinion between the plaintiffs and the inspector as to what was solid ground.

Both he and Taylor, plaintiffs' chief architectural engineer on the job, say that the contractor who had excavated the basement and built the foundation walls had excavated so far beyond the foundation walls that the front foundation walls of the entrances would have been deprived of lateral support if they were carried only to the four-foot minimum, and that this made it necessary to go down to a greater depth in order to reach a bearing that was solid underneath and had solid lateral support.

Whatever the reason necessitating excavation below the four-foot minimum, or whether or not it was necessary to do

so, all parties agree that the excavation was carried no further than was necessary, in the opinion of the defendant's engineer, to reach solid ground. The only difference between them is whether or not as a matter of fact they were carried below solid ground. It is unnecessary, however, for us to determine this fact, because the contract commits the settlement of such disputes to the contracting officer. Article 15 of the contract provides:

> * * * Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer, or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. * * *

Plaintiffs agree that what is solid bearing is a matter of opinion. They concede that two men might honestly disagree about this. They did disagree in this case and that disagreement has been settled adversely to the plaintiffs by the party to whom the contract commits the settlement of such disputes. *John McShain, Inc.*, v. *United States*, 308 U. S. 512, 513, and cases there cited. There can be no doubt that the settlement of questions of this sort was within the province of the contracting officer or his duly authorized representative. He was on the ground and saw the actual conditions and was in much better position to determine what was solid bearing than anyone not on the ground. The parties plainly intended to leave to him the settlement of such disputes.

Even though the extra depth was necessitated by the work of the foundation contractor, plaintiffs are not entitled to recover of the defendant, because, among other reasons, paragraph 5 of section 8 of the "Special Conditions" of the specifications required the contractors to examine the work already performed on the site and to notify the contracting officer if they thought there was any discrepancy between the work actually done and that called for under the foundation contract. This section provided that—

> * * * Failure of the Contractor to notify the Contracting Officer within fifteen (15) days after turning over the project site or any section thereof to the Contractor that the foundation work done under the Foundation Contract is not in accordance with the Foundation Contract will be deemed conclusive evidence that the work called for under the Foundation Contract has been performed in accordance with that contract. * * *

II

Plaintiffs' next claim is that certain waterproofing which they were required to do was an extra.

As stated, a previous contractor had constructed the foundation walls of the buildings, but the plaintiffs were required to install a concrete slab on the floor of the basement which connected with the foundation walls. Water seeped in between the foundation walls and the basement floor slab, and the Project Engineer, under date of March 13, 1937, demanded of plaintiffs that this situation be corrected. The plaintiffs took the matter up with their subcontractor, who insisted that this waterproofing was not a part of its contract. The plaintiffs then, on March 26, 1937, wrote the Project Engineer protesting against being required to do this work. The Project Engineer, however, continued to insist that this was a part of plaintiffs' contract, even to the point of saying to plaintiffs in his letter of March 27, 1937:

> * * * The work in its present state is unsatisfactory and not acceptable to this office, and until these cellars are waterproofed, a 100% payment on account of concrete work cannot be made.

Still the plaintiffs protested against being required to do the work, notwithstanding further demands on them by the Project Engineer, made on April 14 and April 23, 1937.

However, on July 1, 1937, the plaintiffs did comply with the demands of the Project Engineer and began undertaking to waterproof these joints, continuing the work until August 20, 1937, when they refused to go any further, notwithstanding the insistence of the Project Engineer that further work be done. Finally, on October 27, 1937, plaintiffs wrote the contracting officer notifying him of the demands of the

Project Engineer and that they had been compelled to do some work along this line, but under protest, and notifying him that they intended to file claim for the work already done and asking for his ruling as to whether or not they would be required to do additional work. Their claim for the work already done was filed two days later. After further correspondence with plaintiffs, the defendant paid plaintiffs the full contract price for their work, without any deduction for completing the waterproofing, but it did not pay them for the waterproofing that already had been done.

On appeal the head of the department disallowed plaintiffs' claim for the waterproofing done.

In this court the defendant makes no claim that this waterproofing was required by the contract, but defends solely upon the ground that plaintiffs did not protest against being required to do this work, as was required by the contract. Paragraph 2 of section 10 of the "General Conditions" of the specifications provides:

> No complaint on the part of the Contractor that work demanded of him is outside the requirements of the Contract Documents, or that any record or ruling of the Contracting Officer is unfair, shall be considered or entertained unless a protest is submitted in writing to the Contracting Officer within ten days after receipt of demands for such work or of such record or ruling stating clearly the basis of the Contractor's objections. Unless the Contractor files such protest as above provided, he will be deemed to have accepted, and shall be conclusively bound by, such demand, record, or ruling.

We think plaintiffs' claim is not barred by this provision of the specifications. It is true they did not protest against doing this additional work until thirteen days after demand had been made upon them, but they did not proceed to do the work in the meantime and did not enter upon it until after they had continued to protest over a period of three and a half months. The quoted provision of the specifications has application, we think, only to a case where plaintiff accedes to the demand made upon him and enters upon the work without protest at the time. In such case he must protest in ten days thereafter; but where he protests before

he enters upon the work, even though after the expiration of ten days after the demand was made upon him, section 10 raises no bar to recovery.

This plainly is the intent of the specifications, as is indicated by the last sentence thereof, which reads:

> Unless the Contractor files such protest as above provided, he will be deemed to have accepted, and shall be conclusively bound by, such demand, record, or ruling.

If the contractor protests before doing the work and continues to do so, of course he cannot be deemed to have accepted the ruling. The record is clear that the plaintiffs always protested against being required to do this work, both before they did any of it and after some of it had been done and further demands were made upon them. None of their acts indicated that they accepted the ruling. The defendant knew that they did not and, therefore, they ought to recover if the work was indeed work in addition to that required by the contract. The defendant does not deny that it was additional work.

Article 5 of the contract providing for extras has no application to a case where the contracting officer insists that the work is required by the contract and specifications. It would be idle for the contractor to demand a written order from the contracting officer for an extra when the contracting officer was insisting that the work required was not additional work. Insisting that it was required by the contract, of course the contracting officer would not give an order as for an extra. In such case plaintiffs are not bound to comply with the provisions of article 5 in order to entitle them to recover for extra work demanded of them. *Davis* v. *United States*, 82 C. Cls. 334, 342–347.

The defendant insists that the plaintiffs' work was faulty and, therefore, that they are not entitled to recover the sum claimed. There is no proof that it was faulty other than that the defendant's project engineer tore out some of it and used a composition different from that used by plaintiffs. The proof shows that plaintiffs' method would have required adding coats of cement where leaks recurred until the leaks were finally stopped. Plaintiffs did not

continue this program because of their insistence that no part of the work should have been required of them. There is no proof to show that the leaks finally would not have been stopped if plaintiffs' program of continuing to add coats of cement where leaks recurred had been followed. That defendant's project engineer chose to adopt a different method is not sufficient proof that the method adopted by plaintiffs would not have done the work satisfactorily.

We are of opinion that the plaintiffs are entitled to recover the amount claimed for the waterproofing performed by them. Judgment will be rendered against the defendant and in favor of the plaintiffs for the sum of $8,131.73. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

EQUIPMENT CORPORATION OF AMERICA, A CORPORATION v. THE UNITED STATES

[No. 45212. Decided October 5, 1942. Defendant's motion for new trial overruled February 1, 1943]

On the Proofs

Government contract; modification by mutual agreement as to price of rental.—Where plaintiff, in response to defendant's invitation for bids for the rental of six gasoline engines of certain specifications, was the lowest qualified bidder; and where plaintiff's bid was accepted by defendant's authorized representative, after proper inspection; and where, thereafter, plaintiff was requested by defendant's authorized representative to accept payment for such rental at a price lower than the original contract price; and where plaintiff so agreed and submitted vouchers accordingly, which vouchers were never paid; it is *held* that plaintiff is entitled to recover the modified contract rental price.

Same.—There was no irregularity in the award of the contract to plaintiff; there was no fraud or bad faith of any kind in connection with the matter.

Same.—It was clearly competent and proper for the parties to the contract to agree, if they so desired, to a modification of the original contract price.

The Reporter's statement of the case:

Mr. Wm. E. Lucas for the plaintiff. *Messrs. Haight, Goldstein and Hobbs,* and *Messrs. Davies, Richberg, Beebe, Busick & Richardson* were on the brief.

Mr. L. R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant.

Plaintiff sues to recover $6,456 for rental of six gasoline locomotives for the period of four months, May 21 to September 20, 1936, at the rate of $269 a month for each locomotive.

The petition is in two counts, the first being on contract and the second on *quantum meruit* for the fair and reasonable rental value.

The defendant accepted plaintiff's bid, made a contract with it, and used the locomotives during a period of four months and paid the plaintiff nothing therefor.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Delaware corporation with principal office and place of business in Chicago, Illinois, and, in addition, has plants and offices in Pittsburgh and Philadelphia, Pennsylvania. It is, and has been for the past thirty-eight years, engaged in the business of buying, rebuilding, renting, and selling contractors' equipment. Plaintiff is and was at all times involved herein a large and experienced renter of contractors' equipment and has had a great number of contracts with the United States entered into pursuant to competitive bidding for the rental of equipment to the Government for use on Works Progress Administration projects, and the plaintiff was and is experienced in servicing, and keeping in good condition and repair, all equipment furnished and rented on such projects.

2. Prior to May 20, 1936, plaintiff and the defendant, pursuant to advertisement by the defendant for bids, had entered into a contract in connection with the Public Works Administration Project No. 1267 at Evanston, Illinois, for the rental by the defendant of certain gasoline locomotives for use on that project. That contract expired on or about

May 21, 1936. The Works Progress Administration project on which the locomotives were being used was not completed, and before the expiration of that contract the Works Progress Administration office at Chicago made a request to the State Procurement Officer of the Procurement Division of the Treasury Department at Chicago, who was the authorized contracting officer for the defendant, for the advertisement for bids and the making of a contract for the rental by the defendant of six gasoline locomotives meeting the requirements of certain written specifications, for use on Works Progress Administration Project No. 1267 at Evanston.

May 12, 1936, the defendant's contracting officer prepared and issued the invitation for bids which was mailed to thirty-six firms and was duly advertised. This invitation for bids, in addition to the bid form, contained and specifically set forth the "equipment specifications," and all other terms and conditions of the contract and specifications to be awarded to the successful bidder. This invitation for bids, contract, and specifications are in evidence as plaintiff's exhibit 8 and are made a part hereof by reference. This invitation and specifications called for six gasoline locomotives, including maintenance and repairs but not including operation thereof, and provided that the "Locomotives shall be of the twenty-four (24) inch gauge track type, of seven to eight (7–8) tons size and shall be rated at not less than thirty-five hundred (3,500) pounds drawbar pull capacity, powered with a gasoline engine unit of sufficient horse-power rating to operate the locomotive at maximum capacity; four (4) speed transmission forward and reverse, closed or open type cab with top, and shall be complete with all equipment, attachments, and accessories, including electric starter, front and rear headlights, warning signal, brakes, sanding and lubricating equipment, tool box with lock and key, and necessary tools for making ordinary adjustments, etc., necessary for efficient operation. When the equipment is delivered to the project as herein provided, it shall be in suitable condition for operation and shall be available as required for the use of the Works Progress Administration for the full rental period."

The specifications further provided that the "equipment shall comply with all Federal, State, County, Municipal, and Works Progress Administration Regulations, where applicable; and shall be subject to inspection by the Works Progress Administration Project Supervisor and Works Progress Administration Safety Consultant."

As to the rental time and period the specifications provided that "The estimated required maximum rental time and period for the equipment is eight (8) months per piece of equipment, commencing on date of delivery acceptance and shall be continuous for the length of time indicated on each purchase order, except where it is terminated either by notice of cancellation, by the completion of the intended work, or by suspension for inoperative periods, if any, according to the last paragraph under *Payment* on Sheet Number 3." The contract and specifications further provided as follows:

> The minimum period to be awarded on this contract (if an award is made) will be for one (1) month rental time for the equipment in the event that after delivery acceptance the total accrued rental time over the rental period does not equal or exceed one (1) month; and this rental time is to cover all damages, if any, sustained by the bidder by reason of the equipment not being used the full estimated required maximum number of months.
>
> *Purchase Orders.*—The U. S. Treasury Department, State Procurement Office, may issue purchase orders not in excess of the estimated maximum rental time and period, as the needs of the project develop. In no case will the bidder receive payments under this contract for rental time not covered by purchase orders issued prior to the expiration of previous purchase orders. In no case will purchase orders be issued in excess of the estimated maximum rental time and period as hereinbefore indicated.
>
> *Notice of Cancellation.*—The U. S. Treasury Department, State Procurement Office, reserves the right at its option, to cancel by written notice to the bidder, the contract that this invitation to bid may become a part of, when in its opinion such cancellation is to the best interests of the U. S. Government, and without giving additional compensation, providing that such cancella-

tions shall not be for the minimum period to be awarded as hereinbefore indicated under Equipment Rental Time and Period on Sheet Number 2.

Payment.—Payment for rental of equipment shall be by the month and payment shall be made for the time that the equipment is available for use on the project starting at time of delivery acceptance and ending at the termination of the equipment rental period as herein specified. Fractional monthly rental time over and above the minimum herein awarded shall be paid for in the proportion that the days of such fractional rental time bear to the total number of calendar days in that month. The term "month" shall mean a calendar month. No payment will be made or rental time allowed for moving equipment to and from the project.

No payment will be made for any period during which the equipment is inoperative due to break-downs or such causes for which the Works Progress Administration is not responsible.

The specifications and contract form also provided with reference to invoicing for rental that "Invoices in quadruplicate identified by file number, purchase order number, and contract number * * * shall be submitted to the U. S. Treasury Department, State Procurement Office, Room 200, 1319 South Michigan Avenue, Chicago, Illinois, monthly, covering the same days and period as the Receiving and Inspection Report of the Works Progress Administration hereinbefore described."

3. Two bids were received by the contracting officer—one from C. E. Carson Company and one from plaintiff.

Plaintiff's bid for the six locomotives was submitted May 14, 1936, at a unit price of $269 a month for each locomotive, or $1,614 a month for the six locomotives of thirty-five hundred pounds drawbar pull capacity with four speed transmission, forward and reverse, and fully equipped as called for by the specifications.

The bid of C. E. Carson & Company for six locomotives was at a unit price of $197 a month for each locomotive, or $1,182 a month for six locomotives.

4. The bids were publicly opened by the contracting officer May 15, 1936, and on May 16 the contracting officer pre-

pared and sent to the state certifying officer of the Works Progress Administration at Chicago a written request for inspection and report on equipment under the bids, stating that

> This requisition calls for the rental of six (6) gasoline locomotives. The apparent low bidder is C. E. Carson Company, 601 St. Clair St., who offers six (6) Whitcomb locomotives.
>
> Will you have an immediate inspection made of these locomotives, and report acceptance or rejection. In case of rejection, specific reasons therefor must be given.

This request was received by the Works Progress Administration State Certifying Officer May 18.

R. A. Bonnell was chief engineer of the Works Progress Administration District #3 at Chicago, and the head of the Operations Division of the Works Progress Administration, and was in charge of operating and inspecting the equipment thereof. It was a part of his authority and duty, as chief engineer and head of the Operations Division, to inspect or have inspected the equipment for rental on which bids had been submitted. The request of the contracting officer for immediate inspection and report was delivered by the Works Progress Administration to Chief Engineer Bonnell for inspection and report. He made, or had made by one of his inspectors, an examination of such locomotives of the C. E. Carson Company, being four in number, as were offered for inspection at Evanston and the six locomotives of the plaintiff. All of the six locomotives of the plaintiff were on the site of the work where they had been used by the defendant under a prior rental contract. None of the four locomotives offered by the Carson Company for inspection had electric starters and none of them was equipped with headlights. Two of these four locomotives had only three speeds forward and reverse, instead of four as called for by the specifications. The inspector was advised that the other two locomotives which were at Springfield, Illinois, had three speeds. The six locomotives offered by plaintiff, and then being used on the project, were fully equipped and met all provisions of the invitation for bids, specifications, and the contract form.

5. May 21, 1936, Chief Engineer Bonnell prepared and made an inspection report and recommendation to the Material Requisition Department of the Works Progress Administration, District #3, upon which the Works Progress Administration's Material Requisition Department prepared and made a report embodying the Bonnell inspection report to the contracting officer. The Bonnell report, so transmitted, was as follows:

MAY 21, 1936.

To: Mr. M. W. Milligan,
Mr. A. P. Dippold.

Offiice: Director of Procurement, Verification Officer, Dist. #3.

From: Mr. J. A. Schaetzel.
Office: Matl' Reqn. Dept., Dist. #3.
Subject: W. P. 1267, Reqn. 66, File 35403.

Having been advised that C. E. Carson Company are low bidder on this requisition and are offering six Whitcomb locomotives, inspection has been made with the following results:

Two of the locomotives are in Springfield, Ill., and therefore cannot be inspected.

The other four do not have electric starter nor have they headlights. Two of these four are three speed instead of the four speed as required in the specifications.

For the above reasons it is necessary that all of the equipment offered by C. E. Carson Company be rejected.

Having been advised that the Equipment Corporation of America is the next low bidder the following report is to be made as to the equipment they bid on:

The equipment is already on the job performing the work satisfactorily under previous contract No. ER-TPS-54-1992 and are in such good mechanical condition that they can be accepted as meeting with requirements of specifications and operation on this requisition and are therefore approved. It is advisable for efficiency of operation and upkeep that the award be made to one contractor.

Will you kindly issue Purchase Order for the rental of the six Equipment Corporation of American locomotives for a period of two months, contracting for a maximum period of rental for eight months. It is re-

quested that this purchase order be issued just as soon as possible in order to prevent closing down of the job.

(Signed) R. A. BONNELL,
R. A. Bonnell,
Chief Engineer, District #3.

VERIFIED:
CHARLES H. RIOCH (Signed).
A. P. DIPPOLD,
Verification Officer, District #3.

JAS: MW
cc. R. A. Bonnell.

(TIME STAMP.) May 21, 1936, 1:25 P. M. Received State Procurement Office, Treasury Dept.

This report of the Material Requisition Department of the Works Progress Administration was taken by Chief Engineer Bonnell to the contracting officer. Bonnell requested action on the bids by the contracting officer and the issuance of a purchase order for the equipment of the successful bidder in order that the work on the Works Progress Administration Project No. 1267 might continue on Monday, on which project 2,000 men were employed. May 21 was Saturday and the purchase order under the prior contract for the rental of plaintiff's locomotives was expiring.

The inspections and the report of Chief Engineer Bonnell, as the head of the Operations Division of the Works Progress Administration, were made under and pursuant to the authority and duties of his office. The inspections were proper, adequate, and correct, and every word of his report and of his recommendation therein was true, correct, and honest, and in accordance with the specifications and the proposed contract. Bonnell's inspections and report were not in any way, or in any respect, fraudulent, or tainted with fraud, nor was there any intention in the making of the inspections and the report to favor one bidder against the other and they were made in accordance and in compliance with the specifications. The inspections, report, and recommendations therein contained were in accordance with and were supported by the written specifications. Upon receipt by the contracting officer of the report of Chief Engineer Bonnell, transmitted through Works Progress Administration's Material Requisition Department, the contracting offi-

cer on May 21 awarded the contract to plaintiff as the lowest qualified bidder. The plaintiff was the lowest qualified bidder. The contracting officer rejected the bid submitted by the C. E. Carson Company. On the same day, May 21, 1936, the contracting officer prepared and issued Purchase Order #49999 to plaintiff under the contract and specifications for the rental of the six locomotives for two months each at the unit price of $269 a month for each locomotive, or a total of $3,228 for the six locomotives for the two months' period starting with the date of delivery. The six locomotives already on the job were delivered on that date and were retained by the defendant in its possession and used on the project from that date until September 20, 1936, when the contract was terminated by the contracting officer as hereinafter mentioned. This purchase order provided, as did the contract, that "Payment for rental of equipment shall be by the month and payment shall be made for the time that the equipment is available for use on the project starting at time of delivery acceptance and ending at the termination of the equipment rental period as herein specified."

6. Following this, and a few days thereafter, a representative of the C. E. Carson Company, who knew at the time the bids were publicly opened on May 15 that its bid was lower than that of plaintiff, went to the office of the contracting officer at Chicago and inquired when the Carson Company would be given a purchase order for the use of its equipment and requested that such purchase order be issued. Following this the representative of the Carson Company went to the Works Progress Administration's office in Chicago and discussed the matter with the assistant supervisor of that office; thereupon, the Supervisor of Operations of District #3 had a conversation on May 25 with the contracting officer of the Procurement Division of the Treasury Department relative to his action on May 21 and the issuance of the purchase order for the six locomotives to plaintiff. On the following day the Works Progress Administration made another inspection of three locomotives of the Carson Company two of which had four speeds, and on that day wrote the contracting officer of the Treasury Department's Procurement Office as follows:

Referring to our conversation of May 25 relative to the issuance of purchase orders for locomotives on Project 1267, said purchase orders having been issued to the Equipment Corporation of America, we wish to advise you that we have under date of May 26 made an inspection of three locomotives delivered on the job by the C. E. Carson Company, of Chicago. These locomotives were tested under actual operating conditions against full load and were found to be satisfactory in all respects. This inspection is to supersede a previous inspection made wherein it was found that these locomotives did not conform to the requirements submitted to the vendor.

The requisition issued and approved for the acquisition of locomotives for this project called for six units. Three of these units have been delivered to the job for test, and three additional locomotives will be furnished on a day certain as determined by the Assistant Supervisor of Operations in charge of this project.

We request that you take the necessary steps to cancel purchase orders issued to the Equipment Corporation of America, who were not the low bidders for the material requisitioned for this project, and that the necessary purchase order be issued to the C. E. Carson Company, the low bidder. Completion of processing to make this award will effect a saving to the Federal Government of some $435.00 per month.

Respectfully submitted.

V. A. ANDERSON /s/,
Supervisor of Operations,
District No. 3, Chicago.

Originated by:

L. D. SUHR /s/,
Assistant Supervisor of Operations.

J. W. LOWELL /s/,
Assistant Supervisor of Operations.

The three locomotives mentioned did not have electric starters nor electric headlights, and the Carson Company did not deliver for inspection and test any other locomotive meeting the requirements of the specifications. Only two had four speeds. Upon receipt of the above-quoted letter of May 26, the contracting officer called plaintiff's authorized officer, who had signed plaintiff's bid, to his office and explained the situation to him and asked him if plaintiff would consent to a cancellation of the contract and give back the

purchase order issued for two months under the award of the contract to plaintiff. The contracting officer also stated to plaintiff that if the situation as it then existed had been before him at the time he issued the purchase order to plaintiff he would not have issued it for six locomotives. Plaintiff refused to do this, and justified its bid on the ground that it was the lowest qualified bidder because its six locomotives called for by the invitation and the specifications met every requirement of the contract and specifications and were then on the job and being used by the defendant, and that the other bid did not meet the specifications. This was true.

Thereafter, on May 28, the contracting officer wrote plaintiff as follows: "This is to confirm telephone conversation between you and our Mr. J. S. Farrell in which Contract No. ER-TPS-54-14513 was suspended, effective one o'clock P. M., Thursday, May 28, 1936." The J. S. Farrell mentioned in the above letter was chief of Commodity Group No. 3 in the office of the contracting officer. About four days after the letter of May 28 above mentioned was written and received by plaintiff J. W. Lowell, Assistant Supervisor of Operations, Works Progress Administration, telephoned plaintiff's officer with whom the contracting officer had theretofore conferred, and to whom the letter of May 28 was delivered, and asked him if plaintiff would be willing to accept $197 a month each for its six engines on the Works Progress Administration's project. Subsequently plaintiff was told by the contracting officer or by an authorized representative in his office that the contracting officer could only pay plaintiff the same price as the low bidder, namely, $197 a month each for the six locomotives and that if it would accept that amount of rental each month the contracting officer would pay the same and that if plaintiff would accept "We promise you we will keep your locomotives on the job the entire life of the project." Plaintiff acquiesced in this. At that time plaintiff had a purchase order for two months which would expire on June 20. The contracting officer did not cancel the contract or state to plaintiff that he would do so. June 18, 1936, the contracting officer wrote plaintiff the following letter:

> Reference is made to a letter from this office addressed to your company under date of May 28, 1936, confirming telephone conversation, in which Contract No. ER-TPS-54-14513 was suspended effective one o'clock P. M., Thursday, May 28, 1936.
>
> This letter hereby rescinds the letter of May 28, 1936, suspending the contract.
>
> Inasmuch as the Contract No. ER-TPS-54-14513, and Purchase Order No. 49999, applying thereto, were executed and forwarded to you in error, this is to advise that payments on this contract and purchase order can be vouchered by this office only at the rate indicated in the bid of the low bidder, namely, one hundred and ninety-seven dollars ($197.00) per month, less two percent (2%) ten days, one percent (1%) twenty days.
>
> Payments may be made on the basis as indicated above effective May 21, 1936, and not prior to that date.

Plaintiff acquiesced in this letter but made no written reply thereto. June 26, 1936, plaintiff submitted to the contracting officer its first invoice for rental for the first month, May 21 to June 20, 1936, at the rate of $197 a month for each locomotive.

July 25, 1936, the contracting officer issued a second purchase order, No. 655515, under the contract for the six locomotives at the contract unit price of $269 a month each, or a total of $1,614, for a period of one month "starting on completion of the rental period previously authorized on purchase order No. 49999 in accordance with your proposal of May 14, 1936, Contract No. ER-TPS-54-14513. A copy of the attached letter dated June 18, 1936, is hereby made a part of this purchase order, and all the terms contained therein are applicable to this purchase order." Plaintiff acknowledged this purchase order and acquiesced therein. At that time the contracting officer wrote to plaintiff to service the locomotives and to make certain needed adjustments and repairs, which were specified. Plaintiff did so.

The defendant continued to use the locomotives under this purchase order as it had under the previous one. July 26, 1936, plaintiff submitted to the contracting officer its voucher for rental for the second month, June 21 to July 20, 1936, at the rate of $197 a month for each engine.

7. August 21, 1936, the contracting officer issued to plaintiff a third purchase order, No. 71750, under the contract for one month from August 20, 1936, for the six locomotives at the unit price of $269 a month each, or a total of $1,641. This purchase order stated that "A copy of the attached letter dated June 18, 1936, is hereby made a part of this purchase order, and all the terms contained therein are applicable to this purchase order." A copy of the contracting officer's letter of June 18, 1936, to plaintiff was attached to this purchase order. The defendant had in its possession and used the six locomotives under all these purchase orders. August 26, 1936, plaintiff submitted to the contracting officer a voucher for the third month, July 21 to August 20, 1936, at the unit rate of $197 a month. The last purchase order expired September 20, 1936. September 26, 1936, the contracting officer terminated the contract in a letter to plaintiff as follows:

> This is to confirm telephonic advice as of September 25th from our Mr. J. S. Farrell to your Mr. J. V. Sullivan to the effect that contract No. ER-TPS-54-14513 is to be cancelled, effective as of the close of business September 25th, 1936.
>
> You are hereby notified that Contract No. ER-TPS-54-14513 is cancelled as of September 25th, 1936, by virtue of the U. S. Treasury Department's authority vested in this contract under paragraph "NOTICE OF CANCELLATION."
>
> This notice of cancellation does not authorize nor infer that the rental time and period specifically indicated in Purchase Order No. 71750 has been extended to cover the interim period between the expiration of Purchase Order No. 71750 and the date of cancellation of Contract No. ER-TPS-54-14513.

8. Up to the time of termination of the contract, plaintiff had not received any payment for rental of the locomotives under the contract and purchase orders and has not at any time since that date received any payment whatever for rental and use by the defendant of said locomotives. The contracting officer had recommended payment to plaintiff of $197 each a month for the locomotives during the contract

period of four months from May 21 to September 20, 1936, and after the adjustment made and acquiesced in by plaintiff, as set forth in the contracting officer's letter of June 18, 1936, had sent the matter to the General Accounting Office in Washington for pre-audit, but up to the date on which the contract was terminated in September 1936 the contracting officer had received no word from the General Accounting Office. It was for this reason that the contracting officer had not paid plaintiff monthly for the locomotives.

9. September 20, 1936, plaintiff submitted another voucher for the rental of the locomotives for the four months' period May 21 to September 20, 1936, inclusive, at the rate of $197 a month for each engine. Later the contracting officer's office requested plaintiff to submit a voucher for the original contract rate of $269 a month for each engine, which would go to Washington where it would be cut down to $197 a month. Plaintiff did so and later plaintiff submitted another voucher for the entire period at the rate of $197 a month.

The Comptroller General refused to authorize the payment of any sum to plaintiff for rental of the engines on the asserted ground that the contract and purchase order of May 21, 1936, and subsequent purchase orders were void, and advised the Secretary of the Treasury that the account of the disbursing officer for any payment for rental and use of the locomotives would not be approved. It was solely for this reason that plaintiff was not paid $197 each per month for the rental and use of the locomotives.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Upon the facts established by the record and set forth in the findings plaintiff is clearly entitled to judgment for $4,728 under its contract with the defendant as modified by the parties, representing rental for six gasoline locomotives possessed and used by the defendant for the period May 21 to September 20, 1936, at the rate of $197 a month for each locomotive. The contract as originally made was pursuant

to advertisement and competitive bidding on the basis of definite specifications which accompanied the invitation for bids, and which constituted the provisions of the proposed contract for which bids were asked. Plaintiff was not the lowest bidder but it was admittedly the lowest qualified bidder. Only one other bid was received for six locomotives required. This bid was at the unit price of $197 a month per locomotive. However, upon inspection of the locomotives offered by this bid, it was found and reported to the contracting officer that none of these locomotives contained all the equipment called for by the specifications and that only two of them had a 4-speed transmission forward and reverse as specifically called for by the specifications. This report was true and was verified by a subsequent inspection, as set forth in the findings, on May 26, 1936. Therefore, none of the locomotives offered by the low bidder met the requirements of the specifications. Upon the opening of bids the contracting officer, who was the procurement officer of the Treasury Department located at Chicago, requested the Works Progress Administration to make an inspection and to report on the equipment. This inspection and report were made by the chief engineer of the Works Progress Administration, who was the head of the operations division and whose duty it was to make such inspections and reports. The contracting officer awarded the contract to plaintiff as the lowest qualified bidder and rejected the bid of the other company.

The C. E. Carson Company, who was the other bidder, endeavored to have its bid accepted and took the matter up with the Works Progress Administration at Chicago with the result that the Works Progress Administration's officials made a test of three locomotives of the Carson Company, which had four speeds forward and reverse, and on May 26 the supervisor of the Works Progress Administration wrote the contracting officer a letter, which is set forth in finding 6, recommending that plaintiff's contract be canceled and a contract awarded The Carson Company for the three locomotives. These three locomotives did not meet the requirements of the specifications as to the specified equipment

thereon. The contracting officer refused to cancel the contract. He had a conference with plaintiff's authorized officer and asked him if plaintiff would be willing to accept a cancelation of the contract and surrender the first purchase order for two months which had been issued. Plaintiff refused to do this. Plaintiff's locomotives were then being used by the defendant and were giving entire satisfaction. They had previously been used by the defendant under a rental contract which had expired.

May 28 the contracting officer suspended the contract until he could reach a decision about the complications that had arisen as a result of the letter of May 26 from the Works Progress Administration. Shortly thereafter plaintiff was told by the contracting officer, or by his authority, that the Government would pay him $197 a month for each locomotive; that if plaintiff would accept that rate the contracting officer would recommend its payment under the contract, and that "If you will accept that, we promise you we will keep your locomotives on the job the entire life of the project." Plaintiff acquiesced in this and that course was adopted and pursued, and on June 18, 1936, it was made effective by the contracting officer as of May 21, 1936, the date when the contract was awarded to plaintiff and the first purchase order was issued for two months. In order to carry this out the contracting officer wrote plaintiff the letter of June 18, 1936, as set forth in finding 6. Plaintiff acquiesced in this letter and thereafter submitted its monthly invoices for rental of the locomotives at the rate of $197 each per month. Following this, on July 25 and August 21, 1936, the contracting officer issued two additional purchase orders under the contract as modified.

Plaintiff's locomotives were accepted and used by the defendant and were at all times in defendant's possession during the whole of the four-months' period for which claim is here made, beginning May 21 and ending September 20, 1936. The contracting officer approved plaintiff's vouchers at the rate of $197 a month each month and recommended payment on that basis, but the Comptroller General finally refused to authorize any payment to be made to plaintiff under

the contract or to approve the accounts for any disbursements to plaintiff for rental of the equipment. For that reason nothing has been paid to plaintiff.

There was no irregularity in the award of the contract to plaintiff. There was no fraud or bad faith of any kind in connection with the matter. The plaintiff was the lowest qualified bidder.

It was clearly competent and proper for the parties after the contract had been made and the first purchase order for two months was outstanding, to agree, if they so desired, to a modification of the contract price. The facts show that they did this and certainly the defendant has no ground to complain because the modification of the contract price was in the defendant's favor. The contract as so modified therefore remained in full effect and force during the entire four-month's period and was binding during that period on both parties.

The defendant accepted delivery of the six locomotives, had possession thereof, and used the same under the contract terms during the period in question, and is bound to pay the agreed contract price of $197 each per month for rental thereof. The amount of such rental for each such locomotive at the rate of $197 a month for the four-months' period is $4,728.

Judgment will therefore be entered in favor of plaintiff in this amount. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

IDA F. BRAUN, ALICE BRAUN MENGES, AND CARL J. BRAUN, INDIVIDUALLY, AND AS EXECUTORS OF THE ESTATE OF HEDWIG W. BRAUN, DECEASED, AND AS LEGATEES AND BENEFICIARIES OF THE WILL OF HEDWIG W. BRAUN, DECEASED, AND AS SOLE PARTIES IN INTEREST BY SUCCESSION UNDER THE LAST WILL AND TESTAMENT OF HERMAN W. BRAUN, DECEASED, v. THE UNITED STATES

[No. 17749 Congressional. Decided October 5, 1942. Plaintiffs' motion for new trial overruled February 1, 1943]

On the Proofs

Estate tax; proceeds of life insurance policies issued prior to enactment of 1918 Revenue Act; report to Congress.—In accordance with Resolution of the Senate (S. 270), referring to the Court of Claims Senate Bill 3869, involving claim for refund of estate tax, as to which the Court of Claims had previously rendered judgment (80 C. Cls. 211), findings of fact, conclusion of law and opinion are ordered certified to the Senate, the Court deciding that as a matter of law the Commissioner of Internal Revenue erred in refusing to refund to plaintiffs the entire overpayment of estate tax of $27,408 and erred in rejecting the timely claim for refund filed by the plaintiffs to the extent of $25,094.20, but plaintiffs failed to institute suit within two years after rejection under Revised Statutes, Section 3226, as amended, and the Court of Claims has no jurisdiction to enter judgment upon plaintiffs' claim under sections 145 and 156 of the Judicial Code (Title 28, U. S. Code, sections 250 and 262), since there was no agreement or promise implied in fact to pay the balance of $25,094.20.

Same; decision in Lewellyn v. Frick, et al.—The defendant's contention that the proceeds of the life insurance policies involved in the case at bar were taxable (the insured having died May 24, 1919) can not be sustained under the decision in *Lewellyn* v. *Frick, et al.*, 268 U. S. 238, in which it was held that insurance proceeds received by beneficiaries under policies on the life of a person dying after the passage of the Revenue Act of 1918, where such policies were issued and the beneficiaries who received the proceeds were designated prior to the enactment of said 1918 act, were not includable in the gross estate for the purpose of determining the net estate subject to the transfer tax under section 402 (f) of the Revenue Act of 1918, since said act was not retroactive. *Bingham* v. *United States*, 296 U. S. 211.

Reporter's Statement of the Case

Same; account stated.—In the instant case the Commissioner of Internal Revenue did not render an account stated, as that term is known in law, when the Commissioner admitted an overpayment, only part of which was allowed, and erroneously denied the balance on the ground that claim therefor had not been timely filed; there was no agreement *implied in fact* of which the Court of Claims would have jurisdiction.

Same; equitable claim; discretion of Congress.—Whether in equity and good conscience, on the basis of an obligation solely implied in law and not in fact, the plaintiffs should be paid the balance of overpayment due them under the decision of the Supreme Court in *Lewellyn* v. *Frick*, *supra*, and which the Commissioner of Internal Revenue was as a matter of law (*Hills* v. *United States*, 73 C. Cls. 128; 80 C. Cls. 41) authorized and directed to refund, and which the Commissioner should have refunded, upon the timely claim filed by the executors, is a matter solely for the decision of Congress.

Same; jurisdiction of the Court of Claims.—Where petition was filed pursuant to Senate Resolution referring to the Court of Claims bill (S. 3869) pending before the Senate; and where the claim presented by the petition was previously before the court and a decision and judgment were entered therein (80 C. Cls. 211); the court does not have authority or jurisdiction to enter judgment under the *proviso* of section 151 of the Judicial Code (Title 28, U. S. Code, Section 257).

The Reporter's statement of the case:

Mr. Louis O. Bergh for plaintiffs. *Mr. Walter G. Moyle*, *Mr. Ralph P. Wanlass*, and *Mr. Victor E. Cappa* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant.

This case, in which plaintiffs claim $25,094.20 with interest representing an overpayment of estate tax, was before this court in a suit brought by the executors on the basis of an alleged implied agreement arising from an alleged statement of account by the Commissioner of Internal Revenue in respect of the estate tax. The court held that as the Commissioner had specifically rejected the refund claim for the balance sued for, the facts and circumstances disclosed with reference to the action of the Commissioner of Internal Revenue were not sufficient to show that there was a statement of account by the Commissioner in such a way or under such circumstances as would give rise to an implied agreement or

promise to pay the balance claimed by the executors, and dismissed the petition November 5, 1934. 80 C. Cls. 211; 8 Fed. Supp. 860. A petition for a writ of certiorari was denied—295 U. S. 760. In certain tax cases subsequently decided, this court held upon the facts and circumstances therein disclosed that in those cases there had been a statement of account showing a balance due the taxpayer under such circumstances and in such a way as to give rise to an agreement or promise implied in fact to pay such balance, and that the only reason for the failure of the Commissioner to pay the balance of the account, as so stated and accepted, was his erroneous legal conclusion that the government was entitled to retain the balance under the statute of limitation. In the present suit the plaintiffs insist that the same situation and the same facts and circumstances exist here as existed in the other cases decided favorably to the taxpayers. This the defendant denies.

Plaintiffs petitioned Congress for payment of $25,094.20 and a bill was introduced authorizing and directing the Secretary of the Treasury to pay the same with interest at six percent per annum from November 18, 1920. Following the introduction of this bill a Senate Resolution was introduced and approved referring the bill for payment to this court under section 151 of the Judicial Code, U. S. Code, Title 28, section 257, pursuant to which resolution the present petition was filed.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Herman W. Braun died testate May 24, 1919, a resident of New York. Hedwig W. Braun and Theodore C. Weygandt were duly appointed, and about June 2, 1919, qualified and became the acting executors of the last will and testament of Herman W. Braun, deceased.

November 18, 1920, pursuant to an extension granted, the executors filed a Federal estate-tax return for the estate of Herman W. Braun, deceased. That return reported a gross estate of $1,452,618.92, deductions therefrom (including the specific statutory exemption of $50,000) of $170,890.51, a net estate of $1,281,728.41, and a total tax of $79,672.84, which

was paid by Hedwig Braun and Theodore C. Weygandt, in their capacity as executors, November 18, 1920.

2. Schedule C of the original estate-tax return reported the proceeds of fourteen separate policies of insurance on the life of the decedent itemized and identified as follows:

Item	Policy No.	Company	Date of policy	Amount of proceeds
1	212090	Germania Life Ins. Co	1-25-1900	$2,345.60
2	423436-7	Mut. Benefit Life Ins. Co	3-2-06	8,612.24
3	1165602-3-4-5	North West. Life Ins. Co	7-29-16	88,673.20
4	2174766 1244960	Mutual Life Ins. Co	9-3-14 6-2-02	8,778.34
5	1267013 1787363-4	Equtable Life Ins. Co	10-9-03 10-16-12	11,021.83
6	435857	John Hancock Life Ins. Co	12-23-15	4,026.40
7	2500592 2499200	Mutual Life Ins. Co	4-30-18 4-30-18	50,028.90
8	838113-4	Penn. Mut. Life Ins. Co	4-25-18	50,346.00
9	346426	Phoenix Mut. Life Ins. Co	4-30-18	25,013.32
10	125941	Conn. Gen. Life Ins. Co	4-30-18	25,052.32
11	573117	Union Cent. Life Ins. Co	5-4-18	25,481.85
12	435856	John Hancock Life Ins. Co	12-23-15	5,000.00
13	431772	do	12-23-15	5,000.00
14	430043	do	12-23-15	5,000.00
				314,080.00

All of the policies listed above were taken out by the decedent, Herman W. Braun, upon his own life. None was payable to his estate and the proceeds of all were receivable by and paid to persons other than his estate. Each and all of those policies except the ones listed under items 1 and 2, as to which the proceeds were $2,345.60 and $8,612.24, respectively, a total of $10,957.84, contained at and prior to the insured's death an express reservation of his right to change the beneficiaries named therein, all as more fully appears in the following paragraph:

3. The policy listed above as item 1 was originally payable to the executors, administrators or assigns of the insured. March 31, 1913, the insured assigned all of his rights, title, and interest in the policy to his wife. The policies listed as item 2 were originally payable to the executors, administrators, or assigns of the insured, but the insured reserved the right to subsequently change the beneficiaries. November 4, 1912, the beneficiary was changed to the insured's wife, if living, otherwise to the executors, administrators, or assigns of the insured. The wife did survive the insured. The policies listed as item 3 contained provisions giving the in-

sured the right to later name the beneficiary. September 4, 1917, his wife was designated as beneficiary and in the event of her death the children of the insured were named as contingent beneficiaries and the insured reserved the right to further change the beneficiaries. No subsequent change was ever made. The first policy listed under item 4 was payable to the insured's wife with a reservation of the right to change the beneficiary. No change was ever made. The second policy listed under item 4 was originally payable to the insured's executors, administrators, or assigns. March 3, 1913, the policy was assigned to the insured's wife, the insured, however, reserving the right to cancel that assignment. The first policy listed under item 5 was originally payable to the estate of the insured but on March 26, 1913, was made payable to the wife of the insured with a reservation of the right to change the beneficiary. The second and third policies listed under item 5 were originally payable to the wife of the insured with a reservation of the right to change the beneficiary. No change was ever made as to any of these policies. The policy listed as item 6 was payable to the insured's wife with a reservation of the right to change the beneficiary. No change was ever made. The policies listed under item 7 were originally payable to the wife and children of the insured equally, the insured reserving the right to change the beneficiaries. No change was ever made. The policy listed under item 8 was originally payable to the wife and three children of the insured in equal shares with a reservation of the right to change the beneficiaries. No change was ever made. The policy listed under item 9 was originally payable to the executors, administrators, or assigns of the insured. September 17, 1918, the wife and three children of the insured were designated as beneficiaries with a reservation of the right to change the beneficiaries. No change was ever made. The policy listed under item 10 was originally payable to the wife and three children of the insured in equal shares with a reservation of the right to change the beneficiaries. No change was ever made. The policy listed under item 11 was originally payable to the wife and three children of the insured with a reservation of the right to change the beneficiaries. No change was ever made. The

policies listed under items 12 and 13 were originally payable to the daughter of the insured with a reservation of the right to change the beneficiary. No change was ever made in either policy. The policy listed under item 14 was originally payable to the son of the insured with the right to change the beneficiary. No change was ever made.

4. After a revenue agent's examination and report the Commissioner of Internal Revenue audited and reviewed the estate-tax return filed November 18, 1920, as aforesaid, and as a result thereof determined a gross estate of $1,452,618.92, deductions therefrom (including the specific exemption of $50,000) in the sum of $147,752.50, a net estate of $1,304,-866.42, and a total tax due thereon of $81,986.64. The executors were advised of that determination by a letter dated December 18, 1922, containing a computation showing the figures set forth in the preceding sentence hereof. In that audit no change was made in the gross estate as shown upon the return and the only changes made by the Commissioner were (1) a disallowance in full of $23,490.78, claimed upon that return as a deduction for executors' commissions, for the reason that the executors had waived and refused to accept any commission whatsoever and (2) an increase in the amount of a deduction claimed for attorney's fees from the returned sum of $10,000 to $10,352.77, which was the exact sum paid for such fees and expenses. These changes produced a net reduction of $23,138.01 in the deductions allowed and a resulting increase of the same amount in the net estate. An additional tax of $2,313.80 was assessed and paid by the executors January 23, 1923. The executors paid a total tax of $81,986.64, upon the transfer of the estate of Herman W. Braun, deceased, said tax being paid in two installments, viz: $79,672.84 November 18, 1920, and $2,313.80 January 23, 1923. The tax was timely assessed and was paid under protest.

5. November 10, 1925, the executors filed a formal claim for refund of $27,408 of the tax so paid. The claim for refund contained the following statement:

> The amount of refund claimed, $27,408, represents that part of the gross estate tax (at 10%) which is based on the inclusion in the gross estate of insurance policies

on the life of the decedent, payable to beneficiaries other than the decedent's estate, in the total amount of $314,-080, less $40,000, which amount is exempt from tax. These policies were all taken out before February 24, 1919, the date of the passage of the estate-tax act, under which this tax was collected, and the insurance policies in question should, therefore, have been excluded from the gross estate of the decedent. *Lewellyn* v. *Frick*, 45 Supreme Court 487, decided May 11, 1925.

6. The Commissioner received that claim for refund and took the following action thereon: He determined that the gross estate included the sum of $314,080, as the proceeds of fourteen policies of life insurance and that no part of this sum in excess of $40,000 or, more particularly, the balance of $274,080 should have been included as part of the decedent's statutory gross estate under the provisions of Treasury Decision 3945, promulgated December 21, 1926, and published in Cumulative Bulletin V-2, page 228. The Commissioner, accordingly, excluded the sum of $274,080 from the gross estate and this adjustment produced a revised gross estate of $1,178,538.92, a resulting net estate of $1,030,-786.42 and a total tax of $54,578.64, which was $27,408 in excess of the tax theretofore collected as aforesaid. The Commissioner so advised the executors in a letter under date of March 10, 1927, set forth below:

> Reference is made to your claim for refund of $27,408, Federal estate tax paid under the Revenue Act of 1918.
>
> Your claim for refund is based on the contention that the value of certain insurance policies payable to beneficiaries, other than the executors in excess of $40,000 should not be included in the taxable estate. It appears that fourteen policies were included in the return in the final audit in the sum of $274,080, being the excess over $40,000. Evidence filed by the estate shows that all of the policies above mentioned were taken out and the beneficiaries named therein before the passage of the Revenue Act of 1918, and no change in beneficiaries was made as to any of the policies since the effective date of the act.
>
> In view of the provisions of Treasury Decision 3945, the Bureau finds that no part of the value of the above-mentioned policies is subject to inclusion in the taxable estate. Accordingly, the following adjustment is made:

Gross estate

Mortgages, notes, cash, and insurance	Returned	Determined	Adjusted
Insurance in excess of $40,000 payable to beneficiaries other than the executors	$274,080.00	$274,080.00	
Gross estate	1,452,618.92	1,452,618.92	$1,178,538.92
Deductions	170,890.51	147,752.50	147,752.50
Net estate	1,281,728.41	1,304,866.42	1,030,786.42
Total tax	79,672.84	81,986.64	54,578.64
Excess payment			27,408.00

However, section 3228 of the U. S. Revised Statutes as amended by section 1112 of the Revenue Act of 1926 provides that all claims for the refunding of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax.

The following tax payments were made by you:

November 18, 1920 .... $79,672.84
January 23, 1923 .... 2,313.80

Your claim for refund was filed November 10, 1925, and the amount refundable thereunder is limited to that portion of the tax paid within the above-mentioned four-year period.

Accordingly, your claim for refund of $27,408 will be certified to the disbursing clerk of the Treasury Department for payment in the sum of $2,313.80, and is rejected as to $25,094.20.

However, before your claim can be finally certified, it will be necessary for you to furnish, as evidence in support thereof, a short-form certificate of current attestation, from the court, showing your appointment as executors, and that such appointment remains in full force and effect. In the event that you have been discharged, there should be submitted in lieu of the above certificate, a statement of the court (a) certifying to the fact of discharge, and (b) setting forth the names of the persons to whom the refund should be made, as well as their addresses, and indicating what portion of the amount subject to refund each should receive.

Upon receipt of the certificate herein requested, your claim will be given further appropriate consideration.

To the foregoing letter from the Commissioner, the executors of the estate of Hedwig Braun replied by letter dated March 25, 1927, as follows:

Pursuant to your letter of March 10, 1927, in the above matter, on behalf and under authority of Mrs. Hedwig Braun, executrix of the estate of Herman Braun, we send herewith a short form of certificate from the surrogates' court of New York County showing the appointment of executors of said estate, and that such appointment has not been revoked, and is in full force and effect.

We understand that with this certificate you will be in a position to certify the payment of the claim for $2,313.80 by way of refund.

It is, of course, understood that acceptance of said amount does not preclude or prejudice the right of executors to contest the decision as to the rejection of the sum of $25,094.20 mentioned in your letter.

7. April 9, 1927, the Commissioner signed a schedule of refunds allowing and certifying for payment a refund to the executors of $2,313.80, with accrued interest thereon of $584.91, making a total sum of $2,898.71. This sum of $2,898.71 was paid by Treasury check April 18, 1927, to Hedwig W. Braun and Theodore C. Weygandt. The remaining balance of $25,094.20 has never been repaid.

8. In May 1932 a suit was filed in the District Court for the Southern District of New York by Hedwig Braun, individually and as executrix of the estate of Herman W. Braun, deceased, against the United States to recover the sum of $25,094.20 and interest thereon from November 18, 1920. That principal sum represented the amount of Federal estate tax paid on account of the inclusion in the decedent's gross estate of the proceeds of the life insurance policies and also the amount which the Commissioner had refused to certify for refund. A motion to dismiss that suit was made by the Government upon the ground that plaintiff's cause of action was barred and upon the further ground that the United States District Court was without jurisdiction in an action against the United States where the amount in controversy exceeded $10,000, except in actions to recover a tax alleged to have been illegally assessed or collected and the Collector to whom it was paid was not in office at the time the action was filed. That motion to dismiss was granted in December 1932 on agreement in open court between counsel for both parties to the action

solely upon the ground that the District Court was without jurisdiction to entertain the suit, upon authority of a decision on November 14, 1932, by the Circuit Court of Appeals for the Second Circuit in *Moses* v. *United States*, 61 F. (2d) 791, and without prejudice to the right of the plaintiff to bring an action in this Court or in any other court.

9. January 17, 1933, the executors filed a suit in this Court for the same sum of $25,094.20, with interest thereon from November 18, 1920. This action (No. 42209) proceeded to a judgment entered November 5, 1934, dismissing plaintiffs' petition (80 C. Cls. 211, 8 F. Supp. 860), holding, in effect, that the claim for refund previously referred to herein was duly filed within the time prescribed by law not only in respect of the sum of $2,313.80, but also in respect of the additional sum of $25,094.20, under the authority of this Court's decision in the case of *Hills* v. *United States*, 73 C. Cls. 128, and holding, in effect, that the executors' suit was barred by the Statute of Limitations, because (1) the suit was not brought within five years after the payment of the last installment of the tax, (2) suit was not brought within two years after the rejection of the claim for refund, and (3) the letter of March 10, 1927, did not constitute an account stated in favor of the executors, thus permitting suit to be instituted upon an implied contract at any time within six years after that date.

10. A motion for a new trial was filed January 2, 1935, and denied February 4, 1935, without any further opinion. A petition for a writ of certiorari, filed in the Supreme Court of the United States, was denied June 3, 1935, 295 U. S. 760, 81 C. Cls. 978.

11. This Court subsequently made special findings of fact and rendered decisions in the following entitled cases:

Wood v. *United States*, January 11, 1937, No. 42818, 84 C. Cls. 367, 17 F. Supp. 521, Cert. den., 302 U. S. 719, 58 S. Ct. 40, 85, C. Cls. 710;

Goodenough v. *United States*, May 3, 1937, Nos. 42825–27, 85 C. Cls. 258, 19 F. Supp. 254;

Clifton Manufacturing Company v. *United States*, June 7, 1937. No. 43149, 85 C. Cls. 525, 19 F. Supp. 723, Cert. den., 302 U. S. 720, 58 S. Ct. 51.

In the above-mentioned three cases the court found as facts and held that by the actions taken by the Commissioner of Internal Revenue and the statements made and set forth by him in the letters and/or certificates of overassessments (no credits being involved) which were delivered to the taxpayers, he had rendered an account stated in each case showing a balance due each of the taxpayers in such a way and under such circumstances as to give rise to a promise or agreement implied in fact to pay such balance so shown to be due. In those cases there was no specific rejection of the refund claims as to any portion of the overpayment for which the accounts were stated. In each case the Commissioner retained a portion of the balance found to be due each taxpayer on the sole ground that the taxpayer in each case was not entitled to receive such portion because it was "barred by statute of limitations." This court held, in accordance with the rule announced in *Toland* v. *Sprague*, 12 Pet. 300, that the Commissioner's erroneous conclusion of law that the government was entitled to retain a portion of the balance found and shown to be due did not, under the facts and circumstances in each case, affect the account stated in the letters or certificates of overassessments which account as stated was accepted by taxpayer in each case. The court, therefore, concluded and decided in each of the three cases above mentioned that the account stated and accepted gave rise to an agreement implied in fact upon which the taxpayer was entitled to maintain suit in this court and to recover the balance of the account as stated, under sections 145 and 156, Judicial Code (U. S. Code, Tit. 28 Secs. 250 and 262). In each case this court entered judgment against the United States and in favor of the plaintiff for the admitted balance due.

12. April 20, 1938, there was introduced in the Senate of the United States a Bill, S. 3869, reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to

Ida F. Braun, Alice Braun Menges, and Carl J. Braun, individually and as executors of the estate of Hedwig W. Braun, deceased, and as legatees and beneficiaries of the will of Hedwig W. Braun, deceased, and as the sole parties in interest by succession under the last will and testament of Hedwig W. Braun, deceased, and under the last will and testament of Herman W. Braun, deceased, the sum of $25,094.20 with interest thereon at 6 per centum per annum from the 18th day of November, 1920, to date of payment.

13. Senate Bill 3869 was thereafter referred to the Senate Committee on Claims and later referred to this Court by a resolution, S. Res. 270, reading as follows:

Resolved, That the bill (S. 3869) entitled "A bill for the relief of Ida F. Braun, Alice Braun Menges, and Carl J. Braun, individually and as executors of the estate of Hedwig W. Braun, deceased, and as legatees and beneficiaries of the will of Hedwig W. Braun, deceased, and as the sole parties in interest by succession under the last will and testament of Hedwig W. Braun, deceased, and under the last will and testament of Herman W. Braun, deceased" now pending in the Senate, together with all accompanying papers, be, and the same is hereby, referred to the Court of Claims, in pursuance of the provisions of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary", approved March 3, 1911; and the said court shall proceed with the same in accordance with the provisions of such Act and report to the Senate in accordance therewith.

14. June 11, 1938, there was filed with this Court a copy of the Bill S. 3869, together with a copy of the resolution S. Res. 270, both set forth above, and also copies of a statement of facts and an additional statement of facts filed with the Senate in support of that Bill.

15. October 7, 1938, within the time provided in Rule 18, there was also filed with this Court a petition setting forth in numbered paragraphs two alleged causes of action concluding with a final prayer for judgment which was, by leave granted in open court on January 9, 1939, amended to read as follows:

WHEREFORE, the plaintiffs pray that this Court revise and correct its findings of fact and conclusions of law

in the case of *Hedwig Braun, Individually, and as Executrix of the Last Will and Testament of Herman W. Braun, deceased, et al.* v. *The United States* (No. 42209, 80 Ct. Cls. 211), so that its findings of fact and conclusions of law in that case will conform to the conclusions of law reached upon the findings of fact made by this Court in the cases of *Henry Stanley Wood* v. *The United States* (No. 42819, 84 Ct. Cls. 367), *Goodenough* v. *The United States* (No. 42825, 19 F. Supp. 254), and *Clifton Manufacturing Co.* v. *The United States* (No. 43149, 19 F. Supp. 723), and report its findings of fact, conclusions of law and proceedings herein to the Senate of the United States in accordance with Senate Resolution No. 270.

16. Judicial Code, Section 151, contains the statutory provision of the Act of March 3, 1911 referred to in S. Res. 270 above, and reads as follows:

SEC. 151. Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant: *Provided, however*, That if it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice

shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court.

17. January 25, 1937, plaintiffs in this pending suit, Ida F. Braun, Alice Braun Menges and Carl J. Braun, were duly appointed and qualified as executors of the estate of Hedwig W. Braun, deceased. They are also legatees and beneficiaries of the estate of Hedwig W. Braun, deceased, who was the sole legatee and distributee of the estate of Herman W. Braun, deceased. Plaintiffs are now the sole remaining parties in interest under the will of said Herman W. Braun and each is entitled to one-third of all net proceeds of his estate including any recovery by reason of the pending suit.

The court decided as a matter of law that the Commissioner of Internal Revenue erred in refusing to refund to plaintiffs the entire overpayment of estate tax of $27,408 and erred in rejecting the timely claim for refund filed by the plaintiffs to the extent of $25,094.20, but the court has no jurisdiction to enter judgment upon plaintiffs' claim under sections 145 and 156 Judicial Code (U. S. Code, Title 28, sections 250 and 262).

LITTLETON, *Judge*, delivered the opinion of the court:

Section 151 of the Judicial Code (U. S. C. Title 28, Sec. 257) under which the petition in this case was filed, pursuant to Senate Resolution 270 of June 7, 1938 (finding 13), provides, among other things, for a report by the court to the Senate of "the facts in the case and the amount, where the same can be liquidated * * *, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant." Inasmuch as the claim presented by the petition was previously before the court and a decision and judgment were entered therein, the court does not now have authority or jurisdiction to enter judgment under the *proviso* of section 151 of the Judicial Code. *Seaboard*

Air Line Ry. Co. v. *United States*, 59 C. Cls. 250; *Stockbridge Tribe of Indians*, 63 C. Cls. 268; *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 C. Cls. 447, 501. But we are required by the statute and the Senate Resolution to find the facts and state our conclusions thereon and certify the same to the Senate for such action as it may deem proper.

The question presented in the prior suit, 80 C. Cls. 211, and by the petition in this case, with respect to which the Senate has asked for a report of the facts and our conclusions, is whether, on the facts and as a matter of law, under the letter of March 10, 1927; plaintiffs' letter of March 25 (finding 6); and the Commissioner's action pursuant to his letter of March 10, there was rendered by the Commissioner to plaintiffs a statement of account showing a balance due them of $25,094.20 in such a way and under such circumstances as to give rise to an agreement or promise implied in fact under Section 145 of the Judicial Code, *supra*, to pay such balance.

Upon the stipulated facts presented, about which there is no dispute, it is shown that the executors in making the estate tax return included in the gross estate for the purpose of determining the value of the net estate subject to the estate tax certain proceeds of life insurance policies of $274,080, representing the amount of such policies in excess of the specific exemption of $40,000. These life insurance policies were taken out by the decedent, Herman W. Braun, on his own life and the beneficiaries thereof were the same as those which he had named and designated in the policies prior to February 24, 1919, the date of the enactment of the Revenue Act of 1918. All the policies, except the one mentioned in item 1 of finding 2 for $2,345.60, expressly reserved to the decedent the right to change the beneficiaries named therein. In respect to this policy, the insured on March 31, 1913, assigned all his right, title, and interest to his wife. No change in any of the beneficiaries was made by the decedent after February 24, 1919.

The estate tax due upon the net estate on the basis of this return was paid by the executors in the amounts of $79,672.84 November 18, 1920, and $2,313.80 January 23, 1923. Subsequently, in May 1925, the court decided the case of *Lewellyn* v.

Frick et al., 268 U. S. 238, in which it was held that insurance proceeds received by beneficiaries under insurance policies on the life of a person dying December 2, 1919, after the passage of the Revenue Act of 1918, but which were taken out by such person and the beneficiaries thereof designated prior to the enactment of the Revenue Act of 1918, were not includible in the gross estate for the purpose of determining the net estate subject to the transfer tax under section 402 (f) of the Revenue Act of 1918, for the reason that that section did not apply and was not intended to apply retroactively to life-insurance policies such as were there involved. That decision was based wholly on nonretroactivity and on its facts it is applicable here. It has never been subsequently modified or changed by the Supreme Court insofar as concerns the taxability of insurance proceeds received by beneficiaries designated prior to the Revenue Act of 1918 under policies taken out prior to that Act and where the insured died without having changed the beneficiaries before the enactment of Section 302 (h) of the Revenue Act of 1924. Section 302 (h) of the Revenue Act of June 4, 1924, expressly made section 302 (g) retroactive as to taxation of life-insurance proceeds, but the decedent in this case died May 24, 1919, the same year in which Frick died, and seven months earlier.

The question decided in *Lewellyn* v. *Frick, et al., supra*, was again considered and approved in *Bingham* v. *United States*, 296 U. S. 211, involving similar facts. The insured in the *Bingham case* died February 27, 1921.

In the case of *Chase National Bank et al.* v. *United States*, 278 U. S. 327, the court held that the proceeds of certain life-insurance policies in which the insured designated the beneficiaries, and reserved the right to change the beneficiaries taken out by him upon his own life in September 1922 after the approval of the Revenue Act of 1921, were includible in the gross estate and subject to the estate tax for the reasons (1) that a transfer of the proceeds to the designated beneficiaries was made by the decedent subject to a power of revocation in him terminable at his death; (2) that the transfer was not complete until his death; (3) that the statutory provision taxing such proceeds was not unconstitutional

and (4) that the taxing statute, effective November 21, 1921, as applied to transfers of insurance proceeds upon the insured's death April 10, 1924, was not retroactive, since the policies were taken out September 13, 1922. The *Chase National Bank case* is therefore clearly distinguishable from the *Frick case*.

The case of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (decided on the same day as *Chase National Bank*) involved the question whether the value of certain property transferred in trust by a person who died May 30, 1922, should be included in the gross estate for the purpose of estate tax. Two of the seven trusts before the court were created in 1903 and 1910 in respect of certain property prior to the enactment of the Revenue Act of 1918. By these two trusts the income therefrom was reserved to the settlor for life and upon his death the income from the corpus of each trust was to be paid to a designated person until the termination of the trust as provided in the trust instrument, with remainders over. By the terms of each trust, there was reserved to the settlor alone the power of revocation of the trusts, upon the exercise of which the trustee was required to return the corpus of the trust to him. The power of revocation was never exercised. The remaining five trusts with respect to similar property were created in 1919 before the enactment of the Revenue Act of 1921, but after the enactment of the similar provisions of the estate tax of the Revenue Act of 1918. In these five trusts the settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to vote any shares of stock held by the trustee, and to control all leases executed by the trustee and to appoint the successor trustee. With respect to each of these trusts, a power was also reserved to alter, change, or modify the trust, which was to be exercised in the case of four of them by the settlor and the single beneficiary of each trust, acting jointly, and in the case of the one remaining trust, by the settlor and a majority of the beneficiaries named, acting jointly. The settlor died without having modified any of the five trusts, except one, which modification was in a manner immaterial to the question presented.

In deciding the *Reinecke case* the court did not mention the case of *Lewellyn* v. *Frick*. As to the two trusts established in 1903 and 1910, prior to the enactment of the Revenue Act of 1918, the court held, at p. 345, that a transfer of property made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death, and that the provision of a taxing act subsequently enacted requiring inclusion of the value of such trust property in the gross estate as applied to the transfers of property there involved was not retroactive, since the death of the transferor followed the passage of the act.

The question presented in the *Reinecke case* arose under section 402 (c), Revenue Act of 1918, an entirely different provision from subdivision (g) of the same section involved in the *Frick case*. Subdivision (c) relating to transfers of property in trust provided that there should be included in the gross estate the value at the time of death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, * * * intended to take effect in possession or enjoyment at or after death (whether such transfer or trust is made or created before or after the passage of this Act) * * *." The court held the transfers of property in trust in 1903 and 1910 there being considered were taxable under 402 (c) independently of the retroactive provision of the subsection, and said:

> As to the two trusts, it is argued that since they were created long before the passage of any statute imposing an estate tax the taxing statute if applied to them is unconstitutional and void, because retroactive, within the ruling of *Nichols* v. *Coolidge*, 274 U. S. 531. In that case it was held that the provisions of the similar § 402 of the 1918 Act, 40 Stat. 1097, making it applicable to trusts created before the passage of the act was in conflict with the Fifth Amendment of the federal Constitution and void, as respects transfers completed before any such statute was enacted. But in *Chase National Bank* v. *United States*, decided this day, *ante*, p. 327, the decision is rested on the ground, earlier suggested with respect to the Fourteenth Amendment in *Saltonstall* v. *Saltonstall*, 276 U. S. 260,

> 271, that a transfer made subject to a power of revocation in the transferor, terminable at his death, is not complete until his death. Hence § 402, as applied to the present transfers, is not retroactive, since his death followed the passage of the statute. For that reason, stated more at length in our opinion in *Chase National Bank* v. *United States*, *supra*, we hold that the tax was rightly imposed on the transfers of the corpus of the two trusts and as to them the judgment of the court of appeals should be reversed.

The court therefore had no occasion in the *Reinecke case* to reconsider the *Frick case* and there is clearly no conflict between them.

As to the remaining five trusts in the *Reinecke case*, the court held that the value of the corpus thereof was not includible in the gross estate for the reason that the transferor could not effect any change in the beneficial interest in the trust without the consent of the beneficiaries whose interests were adverse, and that, for all practical purposes, each trust at the time created in 1919 had passed as completely from any control by the decedent which might inure to his own benefit as if the gift had been absolute.

We think the *Reinecke*, *Chase National Bank*, and *Hallock cases* are distinguishable on their facts from a case involving proceeds of insurance contracts such as were involved under the facts present in *Lewellyn* v. *Frick*, supra. See *United States* v. *Eaton*, 169 U. S. 331, 347, 348. The facts and principle of the *Frick case* are applicable to the case at bar. But if, for any reason, the principle announced in the *Frick case* is not distinguishable from that announced in the subsequent cases of *Reinecke* v. *Northern Trust Company*, *supra; Chase National Bank et. al.* v. *United States*, *supra*, and *Helvering* v. *Hallock*, *supra*, the question of whether the *Frick case* should be modified is one for the Supreme Court to decide.

The case of *Helvering* v. *Hallock*, 309 U. S. 106, involved certain transfers of property in trust. One of the trusts was created in 1907 and the other two were created in September and October 1919, respectively. The creators of the three trusts died in 1932, 1934, and 1930, respectively. The question before the court arose under the Revenue Act

of 1926 as amended by the Revenue Act of 1932, and was whether the transfers of property made in trust under circumstances there disclosed were within the provisions of section 302 (c) of that act, which section was substantially the same as 402 (c) of the 1918 act. The question decided in *Lewellyn* v. *Frick et al., supra*, was not mentioned. The court held that "Section 302 (c) deals not with property technically passing at death but with interests theretofore created. The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment. * * * 'It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.' *Klein et al.* v. *United States*, 283 U. S. 231, 234."

In *Bailey* v. *United States*, 90 C. Cls. 644, we held that the proceeds of life-insurance policies in excess of the specific exemption were includible in gross estates and subject to the estate tax as a part of the net estate where the policies were taken out by the decedent upon his own life after the effective date of the revenue acts taxing such proceeds even though, before his death, the insured had assigned such policies and surrendered the right to change the beneficiaries therein named, because such policies contained a provision that the proceeds thereof should be payable to the executors, administrators, or assigns of the insured if he should survive the beneficiaries and assignees. Because the policies were taken out after the effective date of a revenue act taxing such proceeds, we held that the taxation of the proceeds was required by the decisions in *Chase National Bank et al.* v. *United States, supra*, and *Helvering* v. *Hallock, supra.*

The defendant's contention that the insurance proceeds involved in the case at bar were taxable (the insured having died May 24, 1919), cannot be sustained under *Lewellyn* v. *Frick, supra*, and such contention is not on the facts supported by *Chase National Bank* v. *United States, supra;*

Reinecke v. *Northern Trust Co.*, *supra*, or *Helvering* v. *Hallock*, *supra*.

We come back therefore to the account stated question growing out of the action of the Commissioner in this case on March 10, 1927.

The executors on November 10, 1925, filed a claim for refund of $27,408 on the ground that the insurance proceeds of $274,080 were not taxable as a part of the gross estate under the decision of May 11, 1925, in *Lewellyn* v. *Frick*, *supra*. On December 21, 1926, after this refund claim had been filed, the Commissioner with the approval of the Secretary of the Treasury promulgated Treasury Decision 3945 (C. B., V-2, p. 228), in which it was held that the proceeds of a life-insurance policy on the life of a person dying after the enactment of the Revenue Act of 1918 were not subject to estate tax where such policy was taken out and the beneficiary therein named prior to the enactment of the Revenue Act of 1918. Thereafter, on March 10, 1927, the Commissioner wrote the executors referring to their claim for refund and pointing out that all of the policies were taken out and the beneficiaries named therein before the passage of the Revenue Act of 1918 and that no change in beneficiaries had been made as to any of the policies since the effective date of that act, and stated: "In view of the provisions of Treasury Decision 3945, the Bureau finds that no part of the value of the above-mentioned policies is subject to inclusion in the taxable estate. Accordingly, the following adjustment is made."

Following this the Commissioner set forth a tabulation showing the adjusted gross estate, deductions, net estate, and the total tax as returned, determined, and adjusted—the last item in the tabulation being "Excess payment, $27,408.00." (Finding 6.) Following this the Commissioner stated:

> However, section 3228 of the U. S. Revised Statutes as amended by section 1112 of the Revenue Act of 1926 provides that all claims for the refunding of any internal revenue tax alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax. * * *

Your claim for refund was filed November 10, 1925, and the amount refundable thereunder is limited to that portion of the tax paid within the above-mentioned four-year period.

Accordingly, your claim for refund of $27,408 will be certified to the disbursing clerk of the Treasury Department for payment in the sum of $2,313.80, *and is rejected as to $25,094.20.* [Italics ours.]

Later and before the Commissioner had taken any further action as to the $2,313.80, the executors, on March 25, wrote the Commissioner as follows in reply to his letter of March 10:

We understand that with this certificate you will be in a positon to certify the payment of the claim for $2,313.80 by way of refund.

It is, of course, understood that acceptance of said amount does not preclude or prejudice the right of executors to contest the decision as to the rejection of the sum of $25,094.20 mentioned in your letter.

Thereafter, on April 9, 1927, the Commissioner signed a schedule of refunds, allowing and certifying for payment a refund to the executors in the amount of $2,313.80 with accrued interest, which amount, with interest, was paid by Treasury check dated April 18, 1927. Nothing further was done or said by either the Commissioner or plaintiffs until May 1932 when the estate instituted a suit in the District Court for the Southern District of New York against the United States to recover $25,094.20, which suit was dismissed by the court in December 1932 solely on the ground that the court was without jurisdiction to entertain the suit, because the amount of the claim exceeded $10,000. Thereafter, on January 17, 1933, the executors filed suit in this court for the same amount on an implied contract under section 145 of the Judicial Code, U. S. C., Title 28, sec. 250, on the basis of an alleged account stated by the Commissioner in his letter of March 10, 1927. This suit was dismissed November 5, 1934, as hereinbefore stated. (See finding 9.)

In the present proceeding it is our opinion that the Commissioner of Internal Revenue did not render an account stated, as that term is known in law, showing a balance due

the estate, in such manner and under such circumstances as to give rise to an agreement *implied in fact* within the jurisdiction of this court under sections 145 and 156 of the Judicial Code. Cf. *United States* v. *Kreider Company*, 313 U. S. 443. Instead the Commissioner expressly stated to the executors that their claim for $27,408 was allowable for payment only in the sum of $2,313.80 and that the claim "is rejected as to $25,094.20." Plaintiffs did not accept such account as so stated but protested it in part. No promise or agreement implied in fact to pay the amount of $25,094.20 can be based upon or arise from this statement of the Commissioner. There was, to be sure, an admitted excess payment by the estate of $27,408, the whole of which, as a matter of law, it was entitled to receive as a refund at that time because as a matter of law the claim for refund had been timely filed under Section 3228, Revised Statutes, as amended by Section 1112, Revenue Act of 1926, as to the entire overpayment of $27,408. *Hills* v. *United States*, 73 C. Cls. 128; 80 C. Cls. 41. And the Commissioner was authorized and directed by Section 3220, Revised Statutes, as amended by Section 1111 of the Revenue Act of 1926, to make refund of the entire overpayment of $27,408. *Hills* v. *United States*, *supra*. The defendant now admits in this case that plaintiffs' claim for refund was timely filed as to the entire overpayment of $27,408 under the *Hills case* and the decisions of other courts on the same question. It may be said that there was a promise or agreement implied in law to pay the admitted overpayment balance of $25,094.20 in respect of which the Commissioner erroneously rejected the claim for refund. But this court does not have jurisdiction of agreements implied in law. *Harley* v. *United States*, 198 U. S. 229; *United States* v. *Buffalo Pitts Company*, 234 U. S. 228. As was said by the court in *Eastern Extension, Australasia & China Telegraph Company, Limited*, v. *United States*, 251 U. S. 355, 363, "It is obvious that no express contract by the United States * * * can be made out from the findings of fact, and it is equally clear that such an implied contract, using the words in any strict sense, cannot be derived from the findings, for it is plain

that there is nothing in them tending to show that any official with power, express or implied, to commit that Government to such a contract ever intended to so commit it. The contention of the claimant must be sustained, if at all, as a quasi-contract,—as an obligation imposed by law independent of intention on the part of any officials to bind the Government,—one which in equity and good conscience the Government should discharge because of the conduct of its representatives in dealing with the subject matter."

In the circumstances the only right of action as to the $25,094.20 which the estate had in this or other federal courts as a result of the Commissioner's action was a suit within two years under section 3226 of the Revised Statutes as amended by section 1113 (a), Revenue Act of 1926, upon the basis of the partial disallowance and rejection by the Commissioner of the claim for refund. The fact that the estate had, as a matter of fact and law, overpaid the tax in the amount of $27,408 under the decision of the Supreme Court in *Lewellyn* v. *Frick*, *supra*, does not entitle the estate to judgment or to payment of the claim unless Congress is willing to waive the failure of the estate to timely pursue the only remedy open to it.

Whether in equity and good conscience on the basis of a quasi-contract, that is, an obligation solely implied in law and not in fact, the plaintiffs should be paid the balance of the overpayment of $25,094.20 due them under the decision of the Supreme Court in *Lewellyn* v. *Frick*, *supra*, and which the Commissioner was, as a matter of law (*Hills* v. *United States*, 73 C. Cls. 128, 80 C. Cls. 41; sections 3220 and 3228, Revised Statutes, as amended by sections 1111 and 1112 of the Revenue Act of 1926), authorized and directed to refund and should have refunded, upon the timely claim filed by the executors, is a matter solely for the decision of Congress.

No claim for a money judgment against the United States can be sustained or allowed by a court on an obligation under the contract provisions of section 145 of the Judicial Code under an obligation which is only implied in law. *Temple* v. *United States*, 248 U. S. 121, 130, 131; *Sutton* v.

United States, 256 U. S. 575, 580, 581; *Merrit* v. *United States*, 267 U. S. 340, 341; *United States* v. *Minnesota*, 271 U. S. 212, 217; *Morse Dry Dock Company*, 77 C. Cls. 57, 73, 74. In *Baltimore & Ohio Railroad Company* v. *United States*, 261 U. S. 592, 597, the court said:

> The "implied agreement" contemplated [by section 145 of the Judicial Code] is not an agreement "implied in law," more aptly termed a constructive or *quasi* contract, where, by fiction of law, a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress, but an agreement "implied in fact," founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.

Good illustrations of an account stated giving rise to a promise or agreement implied in fact, are *Bonwit Teller Co.* v. *United States*, 283 U. S. 258, and *Midpoint Realty Co.* v. *United States*, 90 C. Cls. 335; 95 C. Cls. 63, 70, 71. In the *Bonwit Teller case* the Commissioner of Internal Revenue decided correctly that a document filed by the taxpayer was a sufficient claim for refund and he proceeded to render a statement of account showing a balance due to the taxpayer, which statement of account was accepted. Later the Commissioner, erroneously in fact, took the position, after the statutory period of limitation within which he could make payment without a claim had expired, that the claim was not sufficient. It was held that there had been rendered an account stated and that there had not been any mistake of fact or law in connection therewith such as would give the Government the right to avoid it.

In the *Midpoint Realty Co. case* the Commissioner and the taxpayer agreed on the amount of the overpayment well within the period of limitation and also within such period the Commissioner rendered to the taxpayer a statement of account showing the balance due with the statement that the same would be refunded or credited, which statement was accepted by the taxpayer—all well within the period of limitation as to payment. The Commissioner de-

layed in making payment and after the period of limitation had expired declined to pay the balance theretofore agreed upon. The account as stated was admitted to be correct in fact and in law, and no mistake of fact or law in the statement of the account was alleged.

The facts in the instant case clearly do not bring it within the decisions in those cases so as to authorize the court to enter judgment for the overpayment under the *proviso* of Section 151 Judicial Code.

The foregoing findings of fact, conclusion of law, and this opinion will be certified to the Senate in accordance with Senate Resolution No. 270. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

THE STANDARD OIL COMPANY OF KANSAS v. THE UNITED STATES

[No. 43582. Decided October 5, 1942. Plaintiff's motion for new trial overruled December 7, 1942]*

On Defendant's Plea of Fraud

Fraud; defendant's plea sustained by the evidence; claim forfeited under the statute.—It is *held* that by the evidence adduced it is established that plaintiff corruptly attempted to practice, and did practice, fraud against the United States in the proof or establishment of its claim against the United States, involving claim for refund of plaintiff's predecessor company's income tax for 1929 and 1930 on account of obsolescence, and that said claim is accordingly forfeited to the United States under the provisions of section 279, Title 28, United States Code (36 Stat. 1141).

Same; agency.—Where the secretary-treasurer of plaintiff corporation, duly authorized to present a claim for refund of corporate income taxes, presented forged corporate minutes to the Bureau of Internal Revenue in proof of said claim, with the knowledge that the minutes were forged; it is *held* that such action on the part of plaintiff's authorized officer was the action of the plaintiff corporation.

*Plaintiff's petition for writ of certiorari denied. See p. 809, *post.*

The Reporter's statement of the case:

Messrs. J. G. Korner, Jr., and *George E. B. Peddy* for the plaintiff. *Messrs. David H. Blair* and *Wright Matthews* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

This case (No. 43582) having been heard on the defendant's special answer and plea of fraud, was decided October 5, 1942; the special answer and plea being sustained and plaintiff's claim declared forfeited to the United States under the provisions of section 279, Title 28, United States Code (36 Stat. 1141).

The plaintiff's motion for a new trial was overruled December 7, 1942.

Thereupon, on January 5, 1943, the plaintiff filed its objection and plea to the jurisdiction of the Court of Claims, alleging that the court was totally without jurisdiction in and to the subject matter raised by defendant's special answer and plea of fraud; and alleging "that the court is without jurisdiction or authority to order a forfeiture of plaintiff's claim in this cause, and that any order or judgment entered, or which may be entered, by this Court adjudicating a forfeiture of this plaintiff's claim is, and will be, null and void and without any force or effect whatever."

Plaintiff's plea set forth that in "the defendant's special answer and plea of fraud" the defendant alleged "that during the consideration of plaintiff's claim for refund by the Treasury Department the plaintiff submitted or caused to be submitted to the *Treasury Department* certain alleged minutes of its Board of Directors, purporting to reflect the action of the Board on the matters on which plaintiff's claim for refund was based, and further alleged that the same were submitted by plaintiff *to the Treasury Department* for the purpose of influencing the *Treasury Department* in the allowance of its claim."

Plaintiff's plea further set forth that in the court's opinion it was stated that "defendant asserts that fraud was prac-

ticed by plaintiff in the presentation to and establishment of its claim *before the Bureau of Internal Revenue*."

Plaintiff's plea further set forth that in the court's conclusions of law it was stated by the court that plaintiff "corruptly attempted to practice and practiced fraud against the United States in the proof or establishment of its claim against the United States," but that the "conclusions of law do not state where or when such attempted fraud was practiced."

Plaintiff's plea further asserted that:

> An examination of the basic jurisdictional statutes, and of the cases interpreting them, establishes that the Court of Claims does not have any jurisdiction whatsoever to order a forfeiture of a tax refund claim where neither a fraud nor an attempted fraud was practiced in the claim or the proof of the claim in the Court of Claims but where such fraud or attempted fraud was practiced solely in an Executive Department of the Government.

Plaintiff's plea further asserted that where such fraud is "practiced or attempted *in an Executive Department* the punishment may be (1) by criminal indictment and (2) by penalties and forfeitures," and that in such cases the statutes provide that "the United States District Courts shall have exclusive jurisdiction."

On January 6, 1943, plaintiff's "Objection and Plea to the Jurisdiction of the Court" was overruled.

The court on October 5, 1942, on defendant's plea of fraud, upon the evidence and the report of a Commissioner made special findings of fact as follows:

SPECIAL FINDINGS OF FACT

1. Plaintiff is a Delaware corporation which was organized in 1932. About November 1932 it became the successor of a corporation of the same name which had been organized under the laws of Kansas and which will sometimes hereinafter be referred to as the "Kansas Company." The latter corporation had been for many years primarily engaged in the refining of petroleum and was so engaged from 1929 to 1932. Much of the gasoline which it produced was

sold to the Standard Oil Company of Indiana to which corporation the Kansas Company also paid royalties under certain patents on account of the cracking process which it employed in its operation.

2. The refining plant of the Kansas Company was equipped with large batteries of stills for refining petroleum by what is known as the cracking process. These stills had been installed from time to time over a period of many years prior to 1929 and many of them were known as Burton stills, which at their time of installation were generally recognized as well adapted for the purpose for which installed. However, prior to 1929 improved types of equipment had come into use and shortly before 1929 a new type of gasoline, "anti-knock" gasoline, came on the market. The Burton stills were not adapted to the production of this new type of gasoline.

During 1929 and for some time prior thereto, the officers and directors of the Kansas Company had been making exhaustive investigations to ascertain whether the Burton stills which they had in their refining plant should be continued in operation in view of the advancement which was taking place in the art and in view of the very great demand which had arisen for this new type of gasoline.

3. Even before 1929, as well as in that year, it was recognized by the officers and directors of the Kansas Company that the Burton stills were becoming obsolete because of the demand for this higher type of gasoline and the lower manufacturing costs which were possible under other types of stills which were being developed. Among the Burton stills which the Kansas Company had at that time were stills designated batteries Nos. 5, 6, 7, 9, 10, 11, and 12. In 1928 stills Nos. 9 and 10 were converted into what was known as the Casper continuous type still which was an improvement over the old type Burton still. The result of this latter conversion was so satisfactory that consideration was given at that time to the possibility of a like change being made with respect to the rest of the stills of that type. However, no such change was ever made as will hereinafter appear. Batteries 5 and 6 were last operated in December 1928; battery No. 5 was dismantled about April 1932 to make way for new construction; and battery No. 6 was converted into storage tanks.

Battery No. 7 was converted in February 1925 to operate as a Kock still and was used in the plant intermittently, making its last run in May 1929. By the end of 1931 it had been completely dismantled. Batteries 11 and 12 were last operated in 1929. Batteries 5, 6, 7, 11, and 12 were capable in 1929 and 1930 of producing the type of gasoline for which they were constructed and there was a market for such gasoline, but their operation during that period and thereafter would have been at a commercial disadvantage to the Kansas Company because of the more modern equipment being installed by its competitors.

4. While consideration had been given in 1929, 1930, and prior thereto, to the question of whether the Burton stills designated batteries 5, 6, 7, 11, and 12 were obsolete and no longer capable of profitable use in manufacture, and while this question had been discussed by the officers and directors of the Kansas Company on many occasions both at meetings of the board of directors and at other times, and while most if not all of the officers and directors were of the opinion that these stills were no longer capable of economical operation in competition with the modern type of still, no formal action was taken by the board of directors in 1929, 1930, or prior thereto, authorizing their abandonment or their elimination from the accounts of the Kansas Company. No reference was made in the minutes for these years of any discussions with respect to the obsolescence or abandonment of these assets, and these stills remained on the books of the Kansas Company and were included in their balance sheets at least until 1932. One reason these assets were not eliminated from the books and financial statements of the company earlier was that such elimination might have adversely affected a financial showing of the company, and another reason was that it would have affected the royalty arrangement which the Kansas Company had with the Standard Oil Company of Indiana under which the Kansas Company was paying to the Standard Oil Company of Indiana 25 percent of its net profits as royalties.

5. In filing its income tax returns for the calendar years 1929, and 1930 in March of 1930 and 1931, respectively, no claim for deduction was made on account of the obsolescence

of batteries 5, 6, 7, 11, and 12. In filing its returns for state and county tax purposes for 1929 in March or April 1929, which included a statement of the valuation of all property owned by it on March 1, 1929, the Kansas Company deducted (among other items) the value of batteries 5, 6, 7, 11, and 12, with the explanation that such items represented obsolete construction and paid its ad valorem state and county taxes on that basis for 1929.

6. March 4, 1932, the Kansas Company filed a claim for refund of $114,602.33 of its income tax for the calendar year 1929 which set forth various general grounds for the refund, none of which made reference to a claim on account of obsolescence or abandonment of assets. That claim was rejected by the Commissioner April 21, 1932, for the reason that it failed to set forth any details of the claim. May 5, 1932, the Kansas Company, through its treasurer, Mr. H. G. Lea, protested the disallowance on the ground that the claim was filed for the purpose of staying the running of the statute of limitations and that an audit was being made from which it was expected the desired details would be supplied. The claim, however, was officially rejected on a schedule dated May 20, 1932.

7. In addition to the claim for refund for 1929, referred to in finding 6, the Kansas Company on the same day filed a claim for refund of $36,346.92 for 1930 and assigned grounds therefor substantially the same as those set out in the claim for 1929, without giving any details as to the basis for the claim. June 3, 1932, the Kansas Company filed further claims for refund for the years 1929 and 1930 in the respective amounts of $103,274.19 and $24,109.73. The bases assigned in these two claims were general in their nature except that reference was made to amended returns which were filed on the same day in which the adjustments purporting to produce the claimed refunds were set forth. June 11, 1932, plaintiff filed a supplemental claim for refund of $107,789.71, which likewise referred to the amended return for 1929. Through the claim for refund for 1929 filed June 3, 1932, and the supplemental claim for the same year filed June 11, 1932, together with the amended return filed June 3, 1932, a deduc-

tion was claimed for obsolescence of batteries 5, 6, 7, 11, and 12, hereinbefore referred to.

8. About November 1932 the Kansas Company was succeeded by plaintiff which was a Delaware corporation of the same name. This change in corporate status came about largely through the efforts of C. B. Wrightsman (hereinafter sometimes referred to as "Mr. Wrightsman" as distinguished from C. J. Wrightsman, his father, whose initials will be used when he is referred to) who, since 1929, had been acquiring stock in the Kansas Company. By March 1930 he was the owner of approximately 10 percent of the stock of the company and at that time he was elected a director. After becoming a director and acquainted with the affairs of the company, he indicated his disagreement with the manner in which the business was being carried on. Prior to that time and during 1928 and 1929 the directors of the Kansas Company were A. S. Hopkins, E. A. Warren, A. L. Morrison, E. A. Metcalf, and Earle W. Evans. Mr. Hopkins had been connected with the company since 1897 and had been president since 1927. Mr. Warren had been with the company for about twenty years prior to 1927 when he was secretary-treasurer, and had been vice president from 1927 to 1932. Mr. Morrison had been connected with the company since 1902 and was secretary-treasurer of the company from 1927 to March 1932, during which latter period he had the custody of the books and records of the company. Mr. Metcalf had been connected with the company since 1924 or 1925 as plant superintendent of its refinery. Mr. Evans had been a member of the board of directors for the several years immediately preceding 1928 and was general counsel as well as a director of the company during the period from 1928 to 1932, inclusive.

When Mr. Wrightsman was elected a director in March 1930, he took the place of Mr. Morrison and the other directors remained unchanged. No change was then made among the officers who were A. S. Hopkins, president; E. A. Warren, vice president; and A. L. Morrison, secretary-treasurer.

9. Between 1930 and 1932, Mr. Wrightsman expressed to the officers of the Kansas Company his disapproval of the

manner in which the affairs of the company were being conducted. These old officers, however, were not in sympathy with the changes proposed by him and Mr. Wrightsman stated that he would take the matter to the stockholders of the company. As a result of this controversy a very bitter proxy fight took place and culminated at a stockholders' meeting of the Kansas Company in March 1932, at which time Mr. Wrightsman gained control of the corporation. At that meeting Mr. Wrightsman had himself elected president, and Messrs. Hopkins and Warren as vice presidents. The former secretary and treasurer, A. L. Morrison, was replaced by H. G. Lea, and Mr. Morrison was made his assistant. Mr. Lea was a former federal revenue agent who had been employed by C. B. Wrightsman's father, C. J. Wrightsman, for several years. Messrs. Hopkins, Warren, and Wrightsman were reelected directors and two new directors, Lionel Burneson and Arthur Bunker, both friendly to Mr. Wrightsman, were elected. From the time of his election as secretary-treasurer in March 1932 until March 8, 1935, Mr. Lea had the custody of the books and records of the Kansas Company and of plaintiff.

As a result of the events which took place in the change of control of the Kansas Company and its succession by plaintiff, bitter feelings arose between the officers of the old corporation and the officers of the new corporation, in particular between Messrs. Hopkins and Warren on the one side and Mr. Wrightsman on the other. When he gained control of the company in March 1932, Mr. Wrightsman became its dominant head and he has continued to occupy a like position with plaintiff. All important acts required his approval and he took an active part in the affairs of the company and those of plaintiff.

About November or December 1932, shortly after plaintiff became the successor to the Kansas Company, plaintiff sold the refining plant to the Standard Oil Company of Indiana. Then or shortly thereafter, Messrs. Hopkins and Warren severed their connection with plaintiff.

10. Shortly after Mr. Wrightsman gained control of the Kansas Company, he employed Arthur Young & Company, an accounting firm, to make a detailed audit of the accounts

of the company, in order to determine its financial condition as of March 31, 1932, and also to obtain certain data in connection with a proposed sale of the refinery to the Standard Oil Company of Indiana. This work consumed several months and in the course of the audit an examination was made of records for prior years including 1929 and 1930. During the course of the examination the accountant for the accounting firm and H. G. Lea, secretary and treasurer of the Kansas Company, advised Mr. Wrightsman that in going over the accounts the accountant had ascertained that insufficient charge-offs had been made in prior years on account of obsolete equipment. Mr. Lea stated that on the basis of this information the company appeared to be entitled to a substantial refund for income taxes paid in prior years. He mentioned his previous experience as a revenue agent as qualifying him to handle this claim for refund without the assistance of outside counsel, and Mr. Wrightsman authorized him to proceed with the preparation of the claim for refund and its prosecution. In addition to preparing claims for refund for 1929 and 1930, amended returns were prepared for those years, the claims for refund and amended returns being those referred to in finding 7 as having been filed in June 1932. In that same connection, the accountant had adjusting entries prepared to write down the plant on account of depreciation and obsolescence, which entries were prepared after discussion with officers and employees of the company, including Messrs. Hopkins, Warren, and Metcalf. These entries provided for the entire elimination of batteries 5, 6, 7, 11, and 12 from the accounts of the company with the explanation that they had been abandoned in the year ended December 31, 1929.

In addition to examining the accounting records, the accountant also examined the company's minute books for 1929 and 1930 but failed to find any authorization therein for the abandonment or charge-off of batteries 5, 6, 7, 11 and 12.

11. After the claims were filed, an examination was made of those claims by a revenue agent and by a valuation engineer from the Internal Revenue Bureau, on the basis of which it was recommended that a deduction be allowed for

the year 1929 on account of obsolescence or loss of useful value of batteries 5, 6, 7, 11 and 12, substantially as set forth in the claims, except for some adjustment as to battery No. 6. In making these examinations, the Government representatives discussed the issues involved, including the question of obsolescence, with the individuals who had been the principal officers of the Kansas Company during the years 1929 and 1930. After appropriate consideration a certificate of overassessment was prepared by the Income Tax Unit showing an overassessment in excess of $75,000, which resulted in part from the allowance of a deduction for the obsolescence of batteries 5, 6, 7, 11 and 12 heretofore referred to.

12. Under the practice of the Internal Revenue Bureau in cases involving amounts such as shown by this certificate of overassessment, in May 1934 the case was referred to the Review Division of the Assistant General Counsel's office for review and approval before issuance of the certificate of overassessment. Until this time the claims had been handled for plaintiff by Mr. Lea and when Mr. Wrightsman would inquire from time to time as to their status, Mr. Lea would tell him they were proceeding satisfactorily and that the refund could be expected in the near future. During this period George E. B. Peddy had been elected a director and made general counsel of plaintiff and at the time of his election in March 1933, Mr. Wrightsman had asked that Mr. Lea go over the matter of the refund claims with Mr. Peddy but Mr. Lea stated that the refund claims were coming along satisfactorily and that it would prolong their disposition to bring someone else into the case. On this and other occasions Mr. Lea resented the suggestion of aid or interference from Mr. Peddy or anyone else in handling the case and assured Mr. Wrightsman and the directors that the refund would soon be received.

Within one or two months after he had been last advised by Mr. Lea that the certificate of overassessment had been prepared by the Income Tax Unit, Mr. Wrightsman on June 20, 1934, called on the Commissioner of Internal Revenue to inquire as to the status of the case and was referred to the attorney in the Assistant General Counsel's office who

was handling it. That attorney advised him that he had not completed his review and no discussion was had of its merits.

13. September 24, 1934, Mr. Wrightsman again called at the office of the Assistant General Counsel to inquire as to the status of the claims. At that time a conference was held in the office of the Head of the Review Division which was attended by the head of the division, the assistant head, the reviewing officer, and the attorney to whom the case was assigned. An engineer of the Bureau was also present. While a general discussion was had at that time of various features of the case, Mr. Wrightsman stated that he was unfamiliar with the details and was unable to discuss the case on its merits but was merely seeking to expedite action. The Bureau representatives pointed out certain ways in which they considered the evidence insufficient to show that the batteries of stills 5, 6, 7, 11, and 12 had become obsolete or were abandoned in the year 1929 as claimed by plaintiff. In particular it was pointed out that contemporaneous evidence in the form of corporate minutes was lacking showing authorization for the abandonment of the stills in 1929, and Mr. Wrightsman was requested to furnish such evidence and anything else he might have of a similar nature from the corporate records of the company. He was also requested to furnish evidence relating to an inventory item which was involved in the same claim. Mr. Wrightsman stated that in view of the large amount of information which the Bureau officials desired and his unfamiliarity with matters of that character he would like to have a letter from the Bureau setting out in detail what had been orally requested of him.

After the conference Mr. Wrightsman communicated with Mr. Lea by long-distance telephone in Houston, Texas, told of his conference with the Bureau in regard to the claim, and asked Mr. Lea if the minute books showed authorization for the charge-off of batteries 5, 6, 7, 11, and 12 in 1929. When Mr. Lea told him that so far as he knew they did not, Mr. Wrightsman responded that the claim would not be allowed if such information was not found in the minute books. Upon his return to Houston, Mr. Lea told Mr. Wrightsman that in his opinion it was not important whether

the minutes showed corporate action with respect to the abandonment or charge-off since the governing statute did not require such action in order to have the deduction allowed.

14. As a result of the conference referred to in the preceding finding, the Assistant General Counsel wrote a letter to plaintiff dated September 27, 1934, which read in part as follows:

> Mr. CHARLES B. WRIGHTSMAN,
> *President, The Standard Oil Company (Kansas), Houston, Texas.*
>
> In re: The Standard Oil Company (Kansas).
>
> SIR: In accordance with your request at a conference in this office on September 24, for an outline of the additional information required in support of the claim for refund filed by your company for the year 1929, you are advised as follows:
>
> The record in the case is deficient in that there is a lack of contemporaneous evidence to show in what year it was determined to abandon the Burton stills which it is claimed were finally abandoned in 1929. The intention to abandon capital assets is a material element in the determination of a loss of this character. A disclosure of all factors which would manifest the intent, such as resolutions of the board of directors, information from corporate minutes, the conclusions or determinations of company officials vested with the requisite authority, and any other facts or circumstances which might indicate when such officials became aware that the assets in question would have to be abandoned, will be of material aid in the consideration of your claim by this office. In addition to the foregoing, information is also desired as to what Burton units were abandoned or supplanted by the Holmes-Manley unit installed in the year 1927.
>
> * * * * *
>
> [The portion of the letter not quoted related to the inventory item.]

15. On receipt by plaintiff of the letter of September 27, 1934, it was turned over to Mr. Lea to secure the necessary information for an appropriate reply. In securing that information Mr. Lea interviewed certain former officials of the Kansas Company and examined documents and records in the possession of plaintiff. After the information had been obtained, Mr. Lea furnished it to Mr. Peddy, plaintiff's

general counsel, who, on the basis of the information so furnished him, prepared the following reply:

During the latter part of the year 1929 the Officers and Directors of The Standard Oil Company (Kansas) concluded that owing to the discovery and perfection of new and improved refining methods, with lower manufacturing costs of operation, that a large portion of the company's investment in plant equipment, including especially its Burton stills, namely:

Batteries:	*Stills*
5 and 6	85–104, inclusive
7	105–114, inclusive
11 and 12	145–164, inclusive

together with receiving houses and acid department, were obsolete and no longer of profitable use in manufacturing.

The company's minute book shows that this matter was under discussion by the officers and directors of this Company on numerous occasions in 1929, during which year it was determined to charge off this obsolete equipment; and it was the intention of the officers and directors of the Company that proper deduction should be made in the tax return of the Company to cover such obsolete equipment. As further evidence of such determination of the officers and directors of this Corporation, the ad valorem taxes of the State of Kansas for the year 1929 were paid on the basis of this charge-off.

The first Holmes-Manley unit installed in the year 1927 was added plant equipment due to the increased demand for the refinery output.

Therefore, no Burton units were abandoned or supplanted by the Holmes-Manley unit installed in the year 1927. In the year 1926, 63,632,427 gallons of gasolene were sold to The Standard Oil Company (Indiana), whereas in the year 1927, 72,532,831 gallons were sold to the same Company.

Very truly yours,

THE STANDARD OIL COMPANY OF KANSAS,
By (Signed) C. B. WRIGHTSMAN.

After the letter had been prepared by Mr. Peddy for the signature of Mr. Wrightsman, Mr. Peddy delivered it to Mr. Lea who in turn forwarded it to Mr. Wrightsman in New York for his signature. Mr. Wrightsman signed it October 16, 1934, and on the following day came to Washington and delivered it to the attorney in the Assistant General Coun-

sel's office who had charge of the case. Accompanying the letter was a document reading as follows:

> The undersigned, H. G. Lea, former Secretary of The Standard Oil Company (Kansas), a dissolved Kansas corporation, does hereby certify that the minute books of the above company show the following resolution was duly adopted at a special meeting of the Board of Directors of the Corporation, duly held on January 7th, 1930:
>
> RESOLVED, That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment including Burton stills, receiving houses, and other items with a view of charging the same off of the records of the Company and deducting the same for both ad valorem and income tax purposes.
>
> WITNESS the signature of the undersigned and seal of the Company this 8th day of October 1934.
>
> (Signed) H. G. LEA,
> *Former Secretary, Custodian of Books and Records.*

16. October 19, 1934, in a letter signed by Mr. Wrightsman, certain information relating to inventory adjustments was forwarded to the attorney in the office of the Assistant General Counsel who was handling the case, and on October 26, Mr. Wrightsman inquired of that attorney by long distance telephone whether his letter of October 19, 1934, had been received. The attorney advised Mr. Wrightsman that the letter had not been received but later in the day found it on his desk, and on the same day advised Mr. Wrightsman by telegram of that fact. However, prior to the receipt of the telegram, Mr. Wrightsman sent another letter to the attorney October 26, 1934, enclosing a copy of his letter of October 19, 1934, and in addition to making reference to the inventory item stated:

> If additional affidavits are required regarding the abandonment of the Burton stills in 1929, I am pleased to say that Mr. A. S. Hopkins, former President of the company, has told me that he would not only make affidavits to that effect but would go to Washington in our behalf. If your Bureau requires it, I can get affidavits to this effect from everybody, including stenographers, in the office of the company at that time.

17. At or about the time referred to in the preceding finding, Mr. Lea requested Mr. Peddy to prepare certain affidavits to be executed by former officers and employees of the Kansas Company and as a basis for such affidavits furnished to Mr. Peddy certain information and documents, including a copy of a purported minute of January 7, 1930, set out in finding 15. On the basis of such information and documents, Mr. Peddy prepared the affidavits. At that time the offices of plaintiff were located in Houston, Texas, and Mr. Lea took the affidavits to Neodesha, Kansas, where the former officers of the Kansas Company resided, for the purpose of securing their signatures thereto. In interviewing Messrs. Hopkins and Warren, Mr. Lea exhibited to them a photostatic copy of the minute of January 7, 1930, and other data and documents with reference to the subject matter of affidavits. Messrs. Hopkins and Warren did not at that time sign the affidavits and further interviews followed in which the minute book containing the resolution of January 7, 1930, was shown to them and various questions relating to the subject matter of the affidavits were discussed. One reason for the delay in signing the affidavits was the hostile feeling of Messrs. Hopkins and Warren toward Mr. Wrightsman and some discussion was had of money which might be paid Messrs. Hopkins and Warren either on account of expenses or for other reasons. Messrs. Hopkins and Warren, however, agreed that the facts stated in the affidavits were correct and on November 2, 1934, they were executed by them. They were identical in terms, that of Mr. Hopkins reading as follows:

> BEFORE ME, the undersigned Notary Public in and for the State and County aforesaid, on this day personally appeared A. S. HOPKINS, to me well known, who, having first been duly sworn, stated upon his oath as follows:
>
> I was President and a Director of The Standard Oil Company (Kansas), a Kansas Corporation, during the year 1929, and during the latter part of said year of 1929 the officers and directors of the company concluded that, owing to the discovery and perfection of new and improved refining methods with lower manufacturing costs of operation, a large portion of the company's investment in plant equipment, including especially its Burton stills, namely:

Batteries:	*Stills*
5 and 6	85–104, inclusive
7	105–114, inclusive
11 and 12	145–164, inclusive

together with receiving houses and acid department, were obsolete and no longer capable of profitable use in nanufacturing.

That the first Holmes-Manley unit installed in the year 1927 was added plant equipment due to the increased demand for refinery output; that the refinery output which was sold to The Standard Oil Company of Indiana from the years 1925 to 1928, inclusive, is as follows:

1925	51,844,752 gallons.
1926	63,632,427 gallons.
1927	72,532,831 gallons.
1928	75,011,872 gallons.

and that no Burton units were abandoned and supplanted by the Holmes-Manley unit installed in the year 1927. In the year 1926, 63,632,427 gallons of gasoline were sold to The Standard Oil Company of Indiana, whereas in the year 1927, 72,532,831 gallons were sold to the same company.

The above-described obsolete equipment was charged off and proper deductions made therefor in the rendition of the company's property for state and county taxes for the year 1929, and as further evidence of the abandonment of this obsolete equipment in the year 1929 the minutes of the corporation reflect that, at a meeting of the Board of Directors held early in January 1930, upon motion of Mr. Metcalf, the Refinery Superintendent, the following resolution was adopted:

"RESOLVED, That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment, including Burton stills, receiving houses, and other items, with a view to charging the same off of the records of the Company and deducting the same for both ad valorem and income tax purposes."

During the same period an affidavit identical in terms was presented to Mr. E. A. Metcalf (who was formerly connected with the Kansas Company as heretofore shown) for his signature, but he refused to sign it as written for the reason, at least in part, that he questioned the correctness of the last paragraph of the document as to whether

the resolution of January 7, 1930, had been adopted by the board of directors. In lieu thereof he executed the following affidavit:

> BEFORE ME, the undersigned Notary Public in and for the State and County aforesaid, on this day personally appeared E. A. METCALF, to me well known, who, having first been duly sworn, stated upon his oath as follows:
>
> I was Plant Superintendent of The Standard Oil Company (Kansas), a Kansas corporation, during the year 1929, and during the latter part of said year of 1929 it was my conclusion, which I believe was shared by the other officers and directors of the company, that, owing to the discovery and perfection of new and improved refining methods, with lower manufacturing costs of operation, a large portion of the company's investment in plant equipment, including especially its old type Burton Stills namely:
>
> | Batteries: | Stills |
> |---|---|
> | 5 and 6 | 85–104, Inclusive |
> | 7 | 105–114, Inclusive |
> | 11 and 12 | 145–164, Inclusive |
>
> were obsolete and no longer capable of profitable use in manufacturing.
>
> The above described obsolete equipment was omitted from tax returns and proper deductions made therefor in the rendition of the company's property for state and county taxes for the year 1929.

An affidavit was also executed on November 3, 1934, by Mr. Earle W. Evans, a director and general counsel of the Kansas Company during 1929, 1930, and prior thereto, which read as follows:

> Before me, the undersigned, a notary public within and for the county and state aforesaid, personally appeared EARLE W. EVANS, of lawful age, who being by me first duly sworn, upon his oath deposes and says:
>
> My name is Earle W. Evans. I am now and for more than twenty-five years last past have been a resident of the City of Wichita, Sedgwick County, Kansas, and during all of that period of time have been engaged in the practice of the law. During the years 1929 and 1930 and for several years immediately prior thereto, I was a member of the Board of Directors of The Standard Oil Company, a Kansas corporation, and attended most of its meetings. The company owned a number of so-

called Burton stills which, according to the information and advices given by the engineers and other employes of the company who I deemed competent to pass upon such matters, had in the progress of the industry become obsolete. That matter was frequently informally discussed at our Board meetings and it was my purpose and intention as a member of that Board of Directors and as I recall it now, it was also the purpose and intention of the other members who participated in such discussions—as I believe they all did—that all such obsolete stills and all other machinery and appliances of every kind which had for any reason become valueless should be taken out of the assets and charged off. Also and as respects any property of the company which had become and at the time was of less value than the figure or figures at which it was carried on the books should be charged off to the full extent of the excess—that is, such items should be charged down to and made to stand on the books of the company at their present value instead of their previous value, if perchance there was any difference.

As above stated, these discussions occurred rather frequently and I am distinctly of the impression that either by express motion or resolution or by an unrecorded understanding the officers were directed to proceed as above outlined and make the chargedowns accordingly. I recall that Burton stills figured prominently in these discussions and that at least some of the Burton stills owned by the company were in the manner above indicated directed to be charged off or charged down. My attention has been called to a resolution purporting to have been adopted at a meeting of the above-mentioned Board of Directors on January 7, 1930, reading as follows:

"RESOLVED, That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment including Burton stills, receiving houses, and other items with a view of charging the same off the records of the Company and deducting the same for both ad valorem and income-tax purposes."

I have no independent recollection now of this resolution or of its adoption, but have no reason to doubt its authenticity. On the contrary, I have reason to believe that it is authentic because its purport is in perfect accord with my understanding and intention and the direction thereby given to the Treasurer and Superintendent to make a survey presents the exact situation as I recall it. It was my purpose and intention that these

stills and such other property as might be found obsolete in whole or in part should be immediately charged off or charged down as the facts of the survey seemed to warrant, and it was my understanding that some of those stills were entirely obsolete and of no value, and it was certainly my purpose and intention that they should be charged off entirely for all purposes.

18. November 5, 1934, Mr. Wrightsman transmitted the affidavits referred to in the preceding finding to the Assistant General Counsel of the Internal Revenue Bureau, the letter of transmittal reading as follows:

> Under date of October 19, 1934, I forwarded to you certain data called for in your letter to me under date of September 27, 1934. Since that time I have contacted practically all of the officers and directors who had charge of the company's affairs during the year 1929, and who consequently would be familiar with the facts and circumstances surrounding the transaction which is now under consideration.
>
> I have obtained affidavits from the following former officers and directors of the company, namely:
>
> A. S. HOPKINS, President and Director;
> E. A. WARREN, Vice President and Director;
> EARLE W. EVANS, Attorney and Director;
> E. A. METCALF, Plant Supt. and Director;
> A. K. REPPERT, Assistant Secretary and Assistant Treasurer;
> A. M. BURTON, Chief Construction Engineer;
> E. E. YORK and MARY HEINBACH, Employees in offices of President, Vice President, and Secretary Treasurer.
>
> The affidavits of the above-named former officers, directors, and employees of the company, are enclosed herewith for your information.
>
> I believe that these affidavits, taken in connection with information which I have heretofore forwarded to you, give you all of the information requested of me in your letter of September 27, 1934.

19. December 1, 1934, the Assistant General Counsel advised plaintiff that the evidence submitted as indicated in the preceding finding had been found incomplete in several particulars and that a further conference would be accorded plaintiff in the event it was desired. In response to that letter plaintiff advised the Assistant General Counsel on

December 4, 1934, that C. J. Wrightsman and H. G. Lea would arrive in Washington the following day, and that it was hoped it would be convenient to grant a conference. These individuals appeared at the office of the Assistant General Counsel on the following day, December 5, 1934, when a conference was held with the same attorneys as were present at the conference of September 24, 1934, referred to in finding 13.

At that conference the Bureau representatives indicated that the evidence was insufficient to substantiate the claim for obsolescence and pointed out that the resolution of January 7, 1930, which had been submitted as shown in finding 15, was directory only and authorized a future survey which could not possibly apply to transactions which had occurred during the year 1929. Mr. Lea's attention was directed to Mr. Wrightsman's letter of October 16, 1934, in which it was stated that the minute book showed that the matter of abandonment of the stills in question had been under discussion on numerous occasions in 1929, and was asked if he had such minutes. Mr. Lea replied that he had searched the records and minute book and had found nothing. After the conference Mr. Lea asked the advice of one of the attorneys how plaintiff's case could be proved, and that attorney told him that unless contemporaneous evidence was produced to establish the abandonment of the stills in 1929 or intention to abandon them at that time the claim would be denied.

20. Following the conference referred to in the preceding finding, C. J. Wrightsman informed C. B. Wrightsman that the case was being badly handled on behalf of plaintiff and advised him that counsel should be employed to represent plaintiff. As a result, the firm of Blair & Korner of Washington, D. C., and Mr. Earle W. Evans (heretofore referred to), were employed to represent plaintiff. December 7, 1934, Mr. Lea and Mr. J. G. Korner, one of the new attorneys employed to represent plaintiff, appeared for a further conference at which the attorneys who were present at the previous conference were in attendance. Mr. Korner explained his unfamiliarity with the details of the case, that he was not prepared to discuss the merits, but that he would famil-

iarize himself with the case and obtain any additional data that might be procured from plaintiff's records and present it. During the discussion one of the attorneys for the Assistant General Counsel pointed out the inadequacy of the evidence on file to support the claim of a deduction for obsolescence particularly with reference either to abandonment in 1929 or intent to abandon the property at that time. The suggestion was made (by plaintiff's counsel) that the Bureau attorneys make a personal investigation of the plaintiff's books and records, and the Bureau attorneys indicated that this might be done, but such an investigation was never made. One suggestion offered by one of the attorneys for the Assistant General Counsel was the possibility of a spread of the obsolescence over a period of years and some discussion was had of this suggestion. Plaintiff's representatives agreed to make a search of the records and minute books with the view of determining whether any contemporaneous evidence existed of the character mentioned by the Bureau representatives. At that time plaintiff's representatives requested and received from the Income Tax Unit a copy of the report of the Bureau engineer who had recommended the allowance of the obsolescence claim. After the conference Mr. Korner inquired of Mr. Lea how the resolution of January 7, 1930, had been discovered and he replied that he did not know other than that some clerk in the office had found it and that he had never searched the minute book. Mr. Korner told Mr. Lea that a search should be made and in the event any other pertinent minutes existed the Bureau representatives were entitled to see them.

21. After the conference of December 7, 1934, plaintiff's counsel (Mr. Korner and Mr. Evans) proceeded with the securing of additional evidence in support of the claim for refund and in that work they were actively assisted by Mr. Lea. During December of that year a representative of the accounting firm of Arthur Young & Company was engaged in the annual audit of plaintiff's books and the accountant was requested by Mr. Lea to examine the minute books for the prior years and see whether a minute could be found which made any reference to the subject matter of the claim for refund for 1929 with particular reference to the abandon-

ment or obsolescence of batteries 5, 6, 7, 11 and 12. Shortly thereafter this accountant called Mr. Lea's attention to a resolution of May 22, 1929, reading as follows:

> RESOLVED, That Estimate No. 492 be granted under date of May 22, 1929, in the amount of $33,027.61 to cover the cost of converting No. 10 Battery Tube Stills to Continuous Stills, and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete.

Later that accountant and the former accountant who had made the examination in 1932 compared their notes and found that while the former accountant's notes made reference to the first part of the resolution no reference was made to the last part reading "and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete." This discrepancy was not called to the attention of plaintiff's officers by the accountant. The part of the resolution just quoted was not a part of the resolution when the other part was adopted by the board of directors and was never adopted by the board of directors.

22. Prior to the discovery of the resolution of May 22, 1929, quoted in the preceding finding, Messrs. Korner and Evans had undertaken to secure additional affidavits from the individuals who were officers of the Kansas Company in 1929 and 1930, which would bring out more pointedly the fact of abandonment in 1929 of the stills in question. Work along this line was being done when the minute of May 22, 1929, was brought to Mr. Korner's attention by Mr. Lea, who forwarded a certified typed copy to Mr. Korner. Immediately after its receipt Mr. Korner, on December 28, 1934, advised Mr. Lea of his gratification at the finding of such a resolution, indicated that such a discovery required a revision of the affidavits which they were then seeking to have the old officers execute, and suggested various other things which Mr. Lea should do in collecting additional evidence. The letter further suggested that a photostatic copy of the minute be secured rather than to use a certified typed copy. A letter to a similar effect was written by Mr. Korner to Mr. Evans which included the statement that a photostatic copy of the resolution was being sent him by

Mr. Lea in order to be assured of the authenticity of the resolution in interviewing Messrs. Hopkins and Warren in connection with the execution by them of revised affidavits.

23. During January and February 1935, the attorneys for plaintiff, Messrs. Korner and Evans, and Mr. Lea were engaged in collecting additional evidence and preparing a brief for presentation to the Bureau, and during that period various interviews were had with Messrs. Hopkins and Warren with respect to the execution of revised affidavits. Messrs. Hopkins and Warren declined to sign revised affidavits which included reference to the minute of May 22, 1929, questioned its authenticity as well as the authenticity of the resolution of January 7, 1930, and in addition at times declined to cooperate with plaintiff's representatives in presenting additional evidence in support of plaintiff's claims for refund. They stated then and testified at the hearing in this proceeding that the facts set out in their affidavits (finding 17), except the facts appearing in the last paragraph thereof with reference to the adoption of the resolution of January 7, 1930, were true. The further explanation was given by them that the first part of the affidavit, with respect to the conclusion of the officers and directors during 1929 that the stills in question were obsolete, represented conclusions of the officers and directors but that such conclusions were never formally acted upon by the board of directors or made the subject of a resolution.

January 3, 1935, Mr. Evans sent the following letter to Mr. Lea with reference to the difficulties he was encountering in securing revised affidavits from Messrs. Hopkins and Warren:

> DEAR MR. LEA: Mr. Hopkins was out of town when I called him today, but I finally got him on the telephone and he has assured me of his willingness to come over here with Mr. Warren to confer with Mr. Henderson and me at an early date. He will take the matter up with Mr. Warren as soon as he returns to Neodesha and then let me know what day they will be here. He talked like next Tuesday would be about the soonest he could manage it, but finally stated that he would go over matters and arrange to come as soon as possible and let me know the date. I will promptly advise you.

Mr. Hopkins rather more than indicated that he was not altogether satisfied with the affidavit he had heretofore made in this matter. The thing that seemed to disturb him most was the reference therein to the resolution of the Board of Directors, as respects which he stated that he had no recollection. I then told him of the purport of the other resolution and suggested that we might be able to frame an affidavit which would have the effect of freeing him of any embarrassment that lingers because of the previous one and at the same time state in more definite and helpful form the facts as they really exist and as they are shown in the earlier resolution—which has just been newly discovered.

Mr. Hopkins indicated no lack of willingness to cooperate, but on the contrary readily agreed with me that we should all of us of the old company do everything we consistently can to aid you in the prosecution of this claim.

Mr. Hopkins did not know whether Mr. Warren was in Neodesha or not, or indeed when he expected to be able to contact him. What he did say was that he would see him just as soon after his return to Neodesha as possible and fix a day for coming over here as early as they conveniently could and let me know about it.

Yours very truly,
(Signed) EARLE W. EVANS.

Mr. H. G. LEA,
The Standard Oil Company of Kansas,
Esperson Building, Houston, Texas.

A further letter of a similar nature was sent by Mr. Evans to plaintiff January 22, 1935:

GENTLEMEN: I have had the affidavit matter up several times with Messrs. Hopkins and Warren since the visit of Messrs. Blue and Lea, and regret to say that neither of them as yet has executed any further affidavit. I have drawn up affidavits now until I am threatened with the ancient malignant disease commonly called "Affidavititis," yet no tangible results. I have had another session with them today and enclose herewith forms which they both say state the truth. Nevertheless they said quite emphatically that they would not sign them up today, but if I wanted to send them over to them at Neodesha they would give the matter further consideration and sign or not as might then seem to them best. However, and as above indicated, each has stated that his affidavit in this form states the truth. I am still hoping to get these affidavits in proper form, but it has been a

long hard pull and has required much patchwork and cutting out. Mr. Henderson has aided me very materially in these negotiations. I am enclosing herewith a copy of an affidavit for Mr. Henderson, which suits him all right, provided the others will depose in like manner.

These gentlemen have said nothing to me about ill treatment by the company as respects other matters, nor has either one indicated that he thinks he has any money coming from the company or should be paid anything. The cause of their present uncertain course is that they believe they were not dealt with frankly in connection with the affidavits that they first made in this matter. They point out that the resolution referred to in their first affidavits (the resolution of January 7, 1930) calls for a survey of plant equipment, including the Burton stills when as a matter of fact they had no Burton stills whatever at that time except (a) those which had already been abandoned as obsolete and (b) two batteries which had been converted into Casper Continuous stills and which were in fact run for some time after that. That would, they say, seem to indicate that the only Burton stills that January 1930 resolution could have referred to were the two batteries that had been converted as aforesaid, yet in the statement that Mr. Hopkins as President made to the stockholders dated January 11, 1930, those stills were referred to in a very complimentary way. They have apparently been thinking much about this matter and are quite certain that all of the Burton stills were absolutely abandoned as obsolete in the year 1929 except the two batteries that had been converted. The reason they do not like to swear to that fact now, however, is that their previous affidavits show that quite some time after such abandonment the Board of Directors undertook a survey—survey of what? Well, amongst other things, they say that that resolution in effect required the Secretary and Superintendent to ascertain whether stills which had long before then been abandoned as obsolete should be again abandoned as obsolete. They think it puts them in an inconsistent position. To put it frankly, these gentlemen do not, in my opinion, believe now that the resolution of January 7, 1930, was ever adopted and yet each of them has already in effect verified it by affidavit. Neither do they, in my opinion, believe that the resolution of May 1929 is genuine. In fact, they think that some of those stills were used after May 1929. They also believe that these affidavits are inconsistent with the statement to stockholders dated January 11, 1930.

I will continue my efforts to straighten this tangle out and hope to have something definite at an early date.

Yours very truly,

(Signed) EARLE W. EVANS.

THE STANDARD OIL COMPANY OF KANSAS,
Esperson Building, Houston, Texas.

The unsuccessful efforts to secure the revised affidavits from Messrs. Hopkins and Warren were carried out largely by Mr. Evans and Mr. Lea without the assistance of Mr. Wrightsman. The objections of Messrs. Hopkins and Warren to signing the affidavits were in general made known to Mr. Wrightsman, but he testified that he attributed their objections to their hostility to him and did not realize the authenticity of the two resolutions was being seriously questioned.

24. In the meantime during January and February 1935, plaintiff's attorneys and Mr. Lea secured affidavits from various individuals other than Messrs. Hopkins and Warren which set out alleged facts why these individuals considered the stills obsolete in 1929. These affidavits included a supplementary affidavit from Mr. Evans, affidavits from petroleum experts, and an affidavit from Mr. Curtis Henderson, who was a technical advisor to the Kansas Company and sat in at many of the meetings of the board of directors.

Prior to a further conference with the Bureau of Internal Revenue, Mr. Korner wrote the following letter, dated February 27, 1935, to the General Counsel of the Bureau, which letter was delivered by Mr. Blair to the attorney who was reviewing plaintiff's claims for refund:

> Herewith we hand you in duplicate memorandum brief regarding this taxpayer's refund claims for 1929 and 1930, accompanied by a volume of exhibits numbered from A to K, inclusive.
>
> The volume of exhibits is too large to attach physically to the memorandum but is incorporated in the memorandum by reference.
>
> It will be remembered that at the conference in the Review Division on December 6–7, 1934, the Bureau officials desired additional information covering the abandonment and discard of the Burton Stills in 1929, and desired copies of gasolene contracts and other documents. All of these are handed to you herewith.

The taxpayer has been as diligent as possible since December to get this data assembled. As you know. the offices of the Company are in Houston, Texas, while much of the evidence had to be secured in Kansas, and this has consumed the time since December.

Attached to the letter was a brief in support of the claims and various exhibits, one of which read as follows:

The undersigned H. G. LEA, former Secretary of THE STANDARD OIL COMPANY (KANSAS), a dissolved corporation, does hereby certify that the Corporation's Minute Book shows that at a Special Meeting of the Board of Directors at Neodesha, Kansas, Wednesday, May 22, 1929, the following resolution was unanimously adopted:

RESOLVED, That Estimate No. 492 be granted under date of May 22, 1929, in the amount of $33,027.61 to cover the cost of converting No. 10 Battery Tube Stills to Continuous Stills, and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete.

WITNESS THE SIGNATURE of the undersigned and Seal of the Company this 20th day of December 1934.

(Signed) H. G. LEA,
Former Secretary and Custodian of Corporation's Books.

Another exhibit was a photostatic copy of the pages of the minutes of the meeting of the board of directors at which the above resolution was alleged to have been adopted. Other exhibits were the affidavits referred to above and certain data on operations of the stills in question.

The conference in the Bureau was first arranged for a date shortly prior to March 8, 1935, but was postponed to March 8, 1935, because of the illness of Mr. Lea. Mr. Korner requested Mr. Lea to bring the original minute book to the conference.

25. A conference was held on March 8, 1935, at which time plaintiff was represented by Messrs. Blair and Korner and Mr. Lea, and the Commissioner by the four attorneys who had been present at the conference of September 14, 1934. Mr. Lea had with him the original minute book and on this and other occasions stated that he had the custody of the books and records of the plaintiff. The conference opened with a general discussion of the merits of the case with particular reference to the claimed loss on account of the aban-

donment of stills 5, 6, 7, 11, and 12 during the year 1929, in which discussion Mr. Korner called attention to the additional evidence which had been secured in support of the claim including the discovery of the resolution of May 22, 1929. Mr. Korner stated that the original minute book had been brought to the hearing in addition to photostatic copies of the minutes for the particular meeting in question and that it was there for examination should the Bureau attorneys desire to examine it. Mr. Lea stated that the key to the book had been lost in some way but that the pages could be removed for examination. During the discussion pages were removed from the book including the pages containing the minutes of May 22, 1929, and while the discussion was continuing one of the attorneys in the office of the Assistant General Counsel called attention to a difference in typing between the first and second pages of the minutes of May 22, 1929, which were on pages 251 and 252 of the minute book. Further examination revealed that page 251, on which the purported resolution of that date hereinbefore referred to appeared, was written on paper with the watermark "Damascus Bond" whereas page 252 was written on paper with the watermark "Construction Bond." Further investigation revealed that the only sheet in the book which was of Damascus Bond was page 251 and that all the other pages were on paper with the watermark "Construction Bond." Mr. Korner expressed surprise in the apparent discrepancy and stated that he had never noticed the difference in typing and had never examined the paper for difference in watermarks. Mr. Lea also expressed surprise at the discovery and stated that he was unable to explain it. He told how the minute had been discovered by the accountant for Arthur Young & Company but said he could not understand how the minute of May 22, 1929, should not have been discovered when the minute of January 7, 1930, was found which was only seven pages removed therefrom in the minute book and appeared on page 258. After the discussion had continued for some time in regard to the discrepancies in the minutes, a further discussion was had on the merits of the case in which Mr. Korner urged that the evidence supported plaintiff's

claim without considering the minutes. The conference ended without any decision being reached. The total number of pages of the 1929 minutes, other than pages covered by lists of stockholders, was 15. They can easily be read in twelve minutes.

26. Immediately after the conference of March 8, 1935, Mr. Korner demanded of Mr. Lea an explanation of the apparent discrepancies in the minutes and an answer to the questions which had been raised by the attorneys for the Bureau at the conference. Mr. Lea stated all of it came as a complete surprise to him and that he was at a loss to explain the matter. Messrs. Blair and Korner examined the disputed minute at their office and questioned Mr. Lea in regard thereto. Mr. Lea communicated with the accountant who had discovered the alleged minute and also communicated with one of plaintiff's clerks in Houston who had been with the Kansas Company for many years. That clerk reported that the Damascus Bond paper was last used about January 1923 and that Construction Bond had been used from 1923 to 1934.

On March 9, 1935, Mr. Lea telephoned Mr. Wrightsman in New York City that the conference on March 8, 1935, with the Bureau had been very satisfactory but that the Bureau desired two or three pieces of additional evidence including an affidavit from an accountant of Arthur Young & Company supporting the minutes which he would obtain in Houston and that he expected the matter to be concluded within ten days. This statement of Lea to Wrightsman was false. On March 11, 1935, Mr. Wrightsman telephoned Mr. Korner and learned from him that the Bureau was seriously questioning the minutes of May 22, 1929. Mr. Wrightsman was both surprised and shocked when he learned what had occurred at the conference and gave instructions that everything possible be done to find out whether the minutes had been altered and if so, by whom. In the meantime on March 9, 1935, Messrs. Blair and Korner appeared at the office of the attorney in the Assistant General Counsel's office who had charge of the case and requested that further action be suspended pending an investigation of the minutes which was being undertaken.

27. Between March 9 and March 28, 1935, plaintiff's attorneys and Mr. Wrightsman proceeded vigorously with an investigation of the entire matter and questioned various individuals who they thought might assist in determining whether the minutes had been altered and if so, by whom. One of the actions taken by the representatives of plaintiff was to secure the services of J. C. Sherman, an examiner of questioned documents. Mr. Sherman submitted a preliminary report after an examination of the minute book in which he concluded that the first page of the minutes of the meeting of May 22, 1929, and the minute of January 7, 1930 (quoted in finding 15), then appearing in the minute book were probably not authentic, and assigned various reasons for his conclusion. Messrs. Wrightsman and Peddy were both of the opinion at that time that the minutes had been altered and that Mr. Lea had something to do with it. Mr. Peddy, who had had previous experience as a prosecuting attorney, undertook to secure a confession from Mr. Lea but after several hours of questioning was unsuccessful, Mr. Lea insisting throughout on his innocence.

28. March 28, 1935, Mr. Korner and Mr. Peddy had a conference in the office of the Assistant General Counsel with the four attorneys who had participated in previous conferences. Mr. Peddy explained in detail the efforts which they had made in their investigation of the questioned minutes and their inability to arrive at a definite conclusion. At that time they left with the Bureau attorneys a copy of the report which had been prepared by Sherman, referred to in the preceding finding, gave the Bureau all the information which they had been able to obtain as a result of their investigation, and requested that an examination of the entire matter be made by the Special Intelligence Unit of the Treasury Department. Either at that conference or the one preceding Mr. Korner stated that Mr. Blair had previously suggested that the minutes be examined by an expert in the Bureau of Standards but that Mr. Lea had objected on the ground that he had not been authorized by plaintiff's officers to release the documents from his custody. At the conclusion of the conference of March 28, 1935, the Bureau attorneys stated that the matter would

be taken under advisement and did not commit themselves on the question of whether the Special Intelligence Unit would be requested to make an investigation. When plaintiff's representatives had heard nothing further from the Bureau on April 11, 1935, Mr. Blair called on the attorney in the Bureau who had charge of the case and requested that the matter be investigated by the Special Intelligence Unit and also suggested that the Bureau might call in Dr. Souder of the Bureau of Standards, who had done some excellent work on questioned documents while he was Commissioner of Internal Revenue. The attorney in the Bureau suggested to Mr. Blair that he would have no objection to his making the request on the Special Intelligence Unit for an investigation. Shortly thereafter Mr. Blair explained the situation to the head of the Special Intelligence Unit and requested that he assign to the work one of the ablest men in the Unit. Mr. Blair was advised an investigation would be made, though no mention was made of the person who would be assigned to the work, and his name was unknown to Mr. Blair until after the assignment was made.

29. On or about May 15, 1935, an agent of the Special Intelligence Unit began the investigation which continued for several months and in which plaintiff cooperated in every possible way and made all its books and records available to the examining agent. During the course of the investigation Messrs. Hopkins and Warren gave affidavits in which they retracted the portion of the affidavit set out in finding 15 with respect to the adoption of the resoultion of January 7, 1930, and also stated that a part of the resolution of May 22, 1929, was never adopted by the board of directors, namely, "and that Nos. 5, 6, 7, 11, & 12 Batteries be discarded and abandoned as obsolete." After an extended investigation the agent for the Special Intelligence Unit reported that he was unable to fix responsibility for the alteration of the minutes.

30. In the meantime on May 31, 1935, the Commissioner addressed a letter to plaintiff as follows:

> Reference is made to your claims for refund in the amounts of $103,274.19 and $36,346.92, income taxes for the taxable years 1929 and 1930, respectively.
> The basis of your claims for the years 1929 and 1930 is (1) that inventories have been overstated and/or

overvalued; (2) gross income has been overstated; (3) cost of goods sold is understated; (4) net income has not been clearly reflected by the use of inventories valued on the basis of cost or market, whichever is lower; (5) sufficient depreciation has not been allowed, and (6) income should be adjusted as set forth in your amended returns for the respective years.

Your contention (1) that the inventories have been overstated or overvalued has been carefully considered and has been denied for the following reasons:

In view of the uncertain and indefinite methods employed by you in the determination of the inventory values employed in the amended returns forming the basis of your claim it is held that you have failed to substantiate your contention. It appears that you have changed your basis for valuing inventories from time to time without first securing permission from the Commissioner of Internal Revenue as provided by Regulations 69 and 74 covering the 1926 and 1928 Revenue Acts, respectively. It is noted that you elected in 1920 under the provisions of section 203, Revenue Act of 1918, to use the lower of cost or market in valuing inventories which was used for the years 1920 to 1922, inclusive, while for 1923 and subsequent years, including 1927, you changed to cost basis of inventories. In the returns for the years 1928 to 1931 you again changed the basis of taking inventories without permission and each return indicates that the lower of cost or market was used in determining the value of inventories.

Your contentions (2), (3), and (4) which are predicated on the allowance of issue (1) have been denied since you have not submitted any evidence which would warrant the allowance of the issues here involved.

The issue (2) in respect to overstatement of gross income is based largely on inventory adjustments as set up in your amended return. Issue (3) is likewise of same character as noted above. It is contended by you in respect to (4) that the net income has not been clearly reflected by the use of inventories valued on cost or market whichever is lower. This issue is denied in accordance with item (1) above.

Your contention that insufficient depreciation has been allowed you has been denied for the following reasons: This issue together with the item of loss of useful value due to obsolescence of equipment continued in use has been given careful consideration. You contend that you are entitled to a greater depreciation on your assets but you have failed to submit evidence of a substantial na-

ture which would warrant the allowance of further depreciation, especially at an accelerated rate. See Treasury Decision 4422, Cumulative Bulletin XIII–1, page 58, in respect to depreciation.

With respect to the loss of $649,000.00 claimed in 1929 as the result of the abandonment of certain Burton Stills it is held that the evidence submitted by you fails to disclose an intent to abandon these stills prior to the close of the taxable years 1929 and 1930. The evidence submitted in connection with the loss claimed in 1929 on the abandonment of Burton Stills discloses that the production output from Burton Stills when compared with the production output of Holmes-Manley Stills was twice as great for the years 1928 to 1930, inclusive, which would tend to indicate that Burton Stills on which obsolescence is claimed were still in actual operation in 1929 and 1930. It is further noted that you did not deduct losses on the equipment in question in 1929 either upon your books or on the return but have raised this issue for the first time in your claim filed with the collector of internal revenue at Wichita, Kansas, under date of June 3, 1932. It appears that these assets were retained in your balance sheets and that you continued to deduct depreciation on them for the years 1929 and 1930.

Your contention (6) that income should be adjusted as shown on your amended returns has been denied for the reasons outlined in contentions No. 1 to 5.

For your convenience the taxable incomes for each of the years 1929 and 1930 are shown as follows:

[Then followed the computation of plaintiff's tax liability.]

For the foregoing reasons, it is proposed to disallow your claims. Official notice of the disallowance of your claims will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

Plaintiff's claims for refund for the years 1929 and 1930 in the respective amounts of $103,274.19 and $36,346.92 were officially rejected by the Commissioner in a letter dated July 3, 1935.

31. September 16, 1935, the Commissioner sent a letter to plaintiff similar to that referred to in the preceding finding with respect to a proposed disallowance of the claims for refund of $107,789.71 and $24,109.73 for the years 1929 and 1930, respectively. November 15, 1935, the Commissioner advised plaintiff of his formal rejection of these claims.

Neither in the letters referred to above nor in the letters referred to in the preceding finding was any reference made to the questioned minutes heretofore mentioned nor did the Commissioner at any time advise plaintiff that the claims for refund were rejected because of the presentation of such minutes.

32. About March or April 1937, when they learned that the Special Intelligence Unit had completed its investigation without being able to fix responsibility for the alteration of the minutes, plaintiff's representatives began consideration of making application to the Bureau for the reopening and reconsideration of the claims for refund which had been rejected as shown in findings 30 and 31, and on May 13, 1937, a written request to that effect was filed with the Chief Counsel, Bureau of Internal Revenue. As a result of that application, the Chief Counsel referred the matter to the Chief Counsel's Committee with whom a conference was arranged for May 19, 1937. At the conference plaintiff's representatives first presented in detail what had occurred with respect to the investigation of the questioned minutes and other matters relating thereto and stated that plaintiff was not relying on these minutes to support its claims but was contending that they were allowable without regard to what minutes might or might not have been adopted. Plaintiff's representatives then presented an argument in support of the claims on their merits. At the conference one of plaintiff's attorneys stated that in order to avoid the long delay which might result in the event the refund had to be reviewed by the Joint Committee on Internal Revenue Taxation because it exceeded $75,000, the plaintiff would be willing to accept an amount slightly less than $75,000.

Shortly after the conference plaintiff's representatives were informally advised that the Chief Counsel's Committee had recommended the allowance of the claim for refund for 1929 in an amount slightly less than $75,000, May 29, 1937, the Chief Counsel issued instructions to the appropriate subordinate or subordinates in the Bureau for the allowance of the claim for 1929 in the amount of $74,000, but while steps were being taken to make the necessary computation and prepare an appropriate certificate of overassessment the

directions of May 29, 1937, were revoked on June 21, 1937, and no allowance of the claim was made.

33. From the time when the minutes were first questioned on March 8, 1935, and at all times since, the plaintiff, through its President, Mr. Wrightsman, its General Counsel and Director, Mr. Peddy, and its counsel, Messrs. Blair, Matthews, and Korner, has cooperated with the Bureau of Internal Revenue and the Commissioner of Internal Revenue and his subordinates, in an endeavor to ascertain the facts relative to the questioned minutes and to ascertain when and by whom the minutes were written or rewritten; and prior to the investigations conducted by the Bureau of Internal Revenue, as well as during the conduct of the investigations, the plaintiff voluntarily brought to the attention of, and voluntarily delivered to, the Bureau and its investigators all of its files and all of its resources in an endeavor to assist the Bureau in its investigations.

34. As heretofore shown, the purported resolution of May 22, 1929, read as follows:

> RESOLVED: That Estimate No. 492 be granted under date of May 22, 1929, in the amount of $33,027.61 to cover the cost of converting No. 10 Battery Tube Stills to Continuous Stills, and that Nos. 5, 6, 7, 11 & 12 Batteries be discarded and abandoned as obsolete.

The last part of that resolution reading "and that Nos. 5, 6, 7, 11 & 12 Batteries be discarded and abandoned as obsolete," and likewise the resolution of January 7, 1930, reading:

> RESOLVED: That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment including Burton stills, receiving houses, and other items with a view of charging the same off of the records of the Company and deducting the same for both ad valorem and income tax purposes.

were never adopted by the board of directors but were thereafter added to those minutes for the purpose of assisting plaintiff in the proof of its claim then pending in the Bureau of Internal Revenue for a refund of taxes. H. G. Lea, plaintiff's Secretary-Treasurer, and agent in the presenta-

tion of the claim, knew, when he presented the minutes to the Bureau, that they were false.

The court held, upon the special findings of fact, that plaintiff, The Standard Oil Company of Kansas, corruptly attempted to practice, and did practice, fraud against the United States in the proof or establishment of its claim against the United States, and accordingly the special answer and the plea of fraud were sustained, and plaintiff's claim declared forfeited to the United States.

MADDEN, *Judge*, delivered the opinion of the court:

The question before us is whether plaintiff practiced, or attempted to practice, fraud in connection with its claim for refund of income taxes paid for the year 1929. The defendant invoked by a proper plea the statute, which is as follows:

> Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim or of any part of any claim against the United States shall, ipso facto, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. 36 Stat. 1141; Section 279, Title 28, United States Code.

The defendant asserts that fraud was practiced by plaintiff in the presentation to and establishment of its claim before the Bureau of Internal Revenue.

A predecessor corporation, Standard Oil Company (Kansas), had been engaged in the refining of petroleum at Neodesha, Kansas, in which operation it was using certain stills. During the year 1929 its officers and directors, who were in close supervision of the operation, concluded that the use of certain of these stills was uneconomical. No formal action on this question was taken by the Board of Directors and no minute was made in the corporation's minute book. No deduction from income was made in the corporation's federal income tax return for 1929, on account of

the obsolescence of these stills, and they remained on the books as assets at least until 1932, though their value was deducted from the corporation's return of its assets for ad valorem taxation by the State and County for 1929.

In March of 1932 Mr. C. B. Wrightsman obtained control of the predecessor corporation and caused to be formed the plaintiff corporation, which took over the assets of the predecessor corporation and, in November, dissolved it. Wrightsman became President of plaintiff, and H. G. Lea, a former federal revenue agent who had been employed by Wrightsman's father for some years, became its Secretary-Treasurer. They held those same offices in the predecessor corporation from March until its dissolution in November.

Shortly after Mr. Wrightsman gained control of the predecessor company in 1932 he employed a firm of accountants to make a detailed audit of the accounts of the company, going over the records for preceding years. The accountant and Lea advised Wrightsman that insufficient charge-offs had been made for obsolescence in prior years, and Lea said that a substantial refund of income taxes paid for those years might be obtained. He said that because of his prior experience as a revenue agent, he could handle the claim without the assistance of outside counsel, and Wrightsman authorized him to proceed with the preparation and prosecution of the claim. Lea prepared and filed an amended return and a claim for refund of $107,789.71 of federal income taxes paid for 1929, setting forth as a ground the obsolescence of batteries of stills Nos. 5, 6, 7, 11, and 12.

An investigation of the claim by agents of the Bureau of Internal Revenue resulted in a recommendation that the claim be allowed in an amount in excess of $75,000, and an appropriate certificate of overassessment was prepared by the Income Tax Unit. Under the practice of the Bureau a certificate for such an amount had to be reviewed and approved by the Review Division of the Assistant General Counsel's office before it could be issued. In May 1934 the certificate was, accordingly, referred to the Review Division.

Wrightsman, becoming impatient at the delay in securing the refund, called at the office of the Assistant General Counsel in June and again on September 24. At the latter

time he had a conference with several officials there, and some insufficiencies in the evidence supporting the claim were pointed out to him, particularly the lack of minutes of corporate action taken in 1929 showing authorization for the abandonment of the stills in that year. He was asked to furnish this kind of evidence, if available, and also some other items of evidence. He asked that the Bureau write him a letter telling him just what information it desired, which the Bureau did. After the conference on September 24, Wrightsman telephoned to Lea asking whether there were minutes relating to the abandonment of the stills. Lea said that so far as he knew there were not. Wrightsman told him that, unless there were minutes, they would lose the case.

At this point begin the activities upon the basis of which we have concluded that the defendant's plea of fraud has been proved.

Lea was then in Houston with the minute book. If he had not read the relevant minutes before that, he would have read them immediately upon receiving this call from the President of the company telling him that the case would fail unless there were minutes. Yet, to justify one in failing to find that Lea forged the minutes later presented, or at least knew that they were forged, we must believe that Lea did not then, and had not before, read the minutes. We do not find that anything so contrary to all human experience occurred.

When President Wrightsman returned to Houston he discussed the question with Lea and Lea said he thought the Government was not justified in insisting upon evidence consisting of corporate minutes. Lea did not tell Wrightsman that he had found a relevant minute. Wrightsman told Lea to go from Houston to Neodesha, Kansas, and other places in that state and interview the persons who had been officers and employees of the old company in 1929 so that Lea could prepare affidavits for them to sign relating to corporate action in that year. Lea made this journey to Kansas, returned to Houston and had the affidavits prepared and was back in Neodesha to get them executed on

November 2. When he started on this first journey he had in the minute book a spurious minute dated January 7, 1930, relating to a survey to determine the obsolescence of stills. He still made no mention of this minute to President Wrightsman. Some months later he told Korner, plaintiff's attorney, that some clerk in the office had called it to his attention. On the witness stand in this hearing he testified, in response to a question of Government's counsel, "I don't remember how it was discovered." Korner, who cross-examined him for plaintiff, and who was later to testify as to what Lea had told him, made no attempt to refresh Lea's recollection as to this vital matter.

Lea took this spurious minute to Neodesha. Metcalf, who had been plant superintendent in 1929 and 1930, refused to execute an affidavit which would have verified the minute, partly because he questioned whether the minute exhibited to him had ever been adopted. Messrs. Hopkins and Warren, who had been officers of the predecessor company in 1929 and 1930, executed affidavits certifying to the minute. Mr. Earle Evans, who had been General Counsel and a director of the old company at the time in question, did not purport, in his affidavit, to recollect the minute, but said he had no reason to doubt its authenticity.

In the meantime Lea caused to be prepared a statement, in the form of a letter dated October 16, 1934, intended to be signed by Wrightsman and addressed to the Government, for the purpose of inducing the Government to allow plaintiff's claim. This statement included the following paragraph:

> The company's minute book shows that this matter was under discussion by the officers and directors of this Company on numerous occasions in 1929, during which year it was determined to charge off this obsolete equipment; and it was the intention of the officers and directors of this Corporation, that proper deduction should be made in the tax return of the Company to cover such obsolete equipment. As further evidence of such determination of the officers and directors of this Corporation, the ad valorem taxes of the State of Kansas for the year 1929 were paid on the basis of this charge-off.

The statement in Wrightsman's letter, prepared by Lea, relating to plaintiff's corporate minutes for 1929, was in direct response to the Government's statement that evidence of corporate minutes was essential. This statement, so far as Lea was concerned, was completely and deliberately false. No one even claims that it was not. No one claims that there was such a minute, or that anyone had told Lea that there was such a minute. As we shall see, a corporate minute dated May 22, 1929, was later manufactured, but Lea himself sets the time when that minute came to his attention as some months later. Lea, the Secretary-Treasurer of plaintiff, then, authorized to prepare and prosecute a claim for refund of taxes, deliberately manufactured an important piece of evidence in the form of a statement by plaintiff's President as to the contents of its minute book, for the purpose of securing that refund.

When Wrightsman, on October 17, 1934, delivered the above statement to the government, he also delivered a statement signed by Lea on October 8, 1934, certifying as having been copied from the minute book of the company, the above mentioned resolution dated January 7, 1930, of the Board of Directors of the predecessor company, directing that a plant survey be made of obsolete equipment, including Burton stills, etc., with a view of charging off this equipment for ad valorem and income tax purposes. That statement was as follows:

> The undersigned, H. G. Lea, former Secretary of The Standard Oil Company (Kansas), a dissolved Kansas corporation, does hereby certify that the minute books of the above company show the following resolution was duly adopted at a special meeting of the Board of Directors of the Corporation, duly held on January 7th, 1930:
>
> *Resolved*, That owing to the perfection of new refining equipment and the present economic conditions, the Treasurer and Superintendent be directed to make a plant survey of all obsolete equipment, including Burton stills, receiving houses, and other items with a view of charging the same off of the records of the Company and deducting the same for both ad valorem and income tax purposes.

Witness the signature of the undersigned and seal of the Company this 8th day of October, 1934.

(Signed) H. G. LEA,
Former Secretary, Custodian of Books and Records.

This supposed resolution had never been considered or adopted by the Board of Directors, but had been manufactured for the purpose of being exhibited to the Government's tax lawyers as proof of the pending claim. A page of the minute book largely covered by a printed notice pasted only at the top, left a space beneath the notice unoccupied. The spurious minute was typed into that unoccupied space.

C. J. Wrightsman, the father of plaintiff's President, and Lea came to Washington for a conference with the attorneys in the Bureau on December 5. These attorneys pointed out that the minute of Jan. 7, 1930, did not prove what was needed with reference to company action in 1929. The attorneys asked Lea if he had the minutes which President Wrightsman had certified to in his letter of October 16 stating that "the minute book showed that the matter of abandonment of the stills in question had been under discussion on numerous occasions in 1929." Lea replied that he had *searched the records and minute books and had found nothing*. This was true. There was no possible reason why Lea should have said it if it was not true. It was damaging to his case, and it was a complete exposure to President Wrightsman's father that he had wilfully and deliberately caused President Wrightsman to make the false statement contained in his letter of October 16.

Immediately following this conference, Lea, apparently not in the presence of C. J. Wrightsman, asked one of the Bureau attorneys how to prove plaintiff's case, and was told that contemporaneous evidence of action in 1929 must be shown or the claim would be denied.

C. J. Wrightsman told his son, President Wrightsman, after this conference that the case was being badly handled by Lea. This was an understatement. He should have told him that Lea was attempting to prove the case by manufacturing evidence, and had already involved him, President Wrightsman, in one such piece of evidence.

Plaintiff then employed counsel, Blair and Korner of Washington, D. C., and Earle W. Evans of Wichita, mentioned above. On December 7, two days after Lea had told C. J. Wrightsman and the Government attorneys that he had searched the records and minute book and found nothing for 1929, Korner asked him how the resolution of Jan. 7, 1930, had been discovered, and he replied that some clerk in the office had found it and that he himself had never searched the minute book. The purpose of this falsehood is obvious. Lea had, by this time, resolved to manufacture a 1929 minute, to satisfy what the Government attorney, two days before, had told him was essential. He knew that when he produced this minute, newly discovered among the few pages of corporate minutes, Korner would know it was forged unless Lea had put him off guard by pretending that he had been both stupid and careless in his previous preparation of the case. Korner told Lea that a search should be made. This, it will be remembered, was on December 7, 1934, and was more than two months after Lea had been told by President Wrightsman to search the minute book.

If Lea had been honest, even though he had been as stupid and careless as he pretended to be, he would have immediately looked through the few pages of minutes and advised Korner that there was, or was not, a 1929 minute which related to the tax claim. But not until December 21, many days later, did he have any message for Korner on this vital question. Lea then forwarded a certified copy of a forged minute dated May 22, 1929, containing language which, if it had been genuine, would have proved plaintiff's case. During the intervening time, a representative of an accounting firm was engaged in the annual audit of plaintiff's books. Lea asked him to examine the minute books for the prior years and see whether a minute could be found which made any reference to the subject matter of the tax claim for 1929, with particular reference to the abandonment or obsolescence of batteries 5, 6, 7, 11, and 12. The accountant did so and shortly produced the minute of May 22, 1929, referred to above, which was exactly in point and apparently conclusive.

Lea's involving the accountant in this "discovery" was the old and despicable trick of planting evidence where it would be discovered and produced by an innocent person, so that if its criminal character should later be disclosed, suspicion would rest upon the one who, apparently, first came upon the evidence. Plaintiff attempted in this proceeding, without the slightest basis in reason, to throw suspicion upon the accountants.

The minute of May 22, 1929, was, as we have said, a forgery. The forgery had been accomplished by removing and destroying the first sheet of a two-sheet set of minutes of that date, the written signatures of the President and Secretary, Messrs. A. S. Hopkins and A. L. Morrison, authenticating the minutes, being on the second sheet, which was left intact; and by obtaining a sheet of paper of the same apparent age and appearance as the sheet which had been removed, and copying the old minutes from the first page upon that sheet in such a position as to leave room for the insertion of the spurious language about discarding batteries of stills as obsolete. A typewriter whose writing resembled as nearly as possible the writing on the second sheet which had been retained was used to type the new sheet. To further conceal the forgery, a beginning had been made of an attempt to type over the words on the second sheet so as to create the appearance, even to the most careful observer, that both sheets had been written with the same typewriter. The new typing could not be made to fit exactly the old, however, and this attempt had been abandoned after a few lines.

After the conference of December 7 between Lea and Korner, Lea, Korner, and Evans proceeded with securing additional evidence in support of plaintiff's claim. It will be remembered that during this time while Lea was searching in far-away places, among unfriendly people, for outside evidence, and though he had been expressly told by President Wrightsman and by Korner to search the minute book which he said he had not yet searched, he still did not, we are asked to believe, look in the minute book which was right in his hands, but finally told an accountant who happened to be

there to look in it. This, of course, is nonsense. Lea's sworn testimony in this case about his search of the minutes was as follows:

> I had looked through the minute books, but only casually. I never did read all of the pages, because the minute books consist of a large number of pages, and it was rather dry reading. I had glanced through them on two or three different occasions.

As we have seen, the minutes for 1929, other than the obviously irrelevant ones, consisted of 15 pages. Their reading time is not more than 12 minutes.

After the production of the 1929 minute, and its report to Korner, the affidavits which Evans had been attempting to get signed in Neodesha, Kansas, by the former officers of the company were revised to include a certification by them of the newly discovered minute. A photostatic copy of the minute was sent by Lea to Evans to exhibit to the affiants as an assurance of its authenticity. Evans attempted persistently to get Messrs. Hopkins and Warren to execute the revised affidavits. These gentlemen refused to sign the affidavits because they thought that the newly discovered minute was a forgery, and because they now knew that the minute of Jan. 7, 1930, which they had previously been persuaded to authenticate by their oaths, was likewise a forgery. They told Evans this, and he wrote it in detail to plaintiff, also stating in his letter that he thought this was the only reason why they would not execute the affidavits, and that they had given no indication that any reason of hostility or avarice entered into their determinations.

This opinion of the persons who would have known best whether the minutes were genuine or not was brought home to President Wrightsman. He might well have caused an immediate investigation to be made to see where this newly discovered evidence, branded by Hopkins and Warren as forged, had come from. Wrightsman preferred to attribute the opinions of Hopkins and Warren to malice or avarice, and to use the questioned minute as the principal basis of plaintiff's claim.

On February 27, 1935, Korner sent to the General Counsel of the Bureau of Internal Revenue a photostatic copy of

the minute of May 22, 1929, a certification by Lea as former secretary and custodian of the corporation's books, of the same minute, and the other affidavits which they had been able to gather. No new affidavits had been obtained from Hopkins or Warren.

Korner arranged for a conference at the Bureau on March 8, 1935. He requested Lea to bring the original minute books to the conference. During the conference, one of the attorneys called attention to the fact that the typing on the two pages of the minute of May 22, 1929, was different, and, after further examination, that the paper on which the first page of those minutes was written had a watermark different from that of all the other sheets in the book. Lea said that the minute had been discovered by the accountant and, in answer to questions, said he could not understand how this 1929 minute had been overlooked when the minute of January 7, 1930, only seven pages away from it in the book was discovered earlier.

After leaving the Government attorneys, Korner, of course, demanded of Lea an explanation of the discrepancies in the minutes, but Lea offered no explanation. On the next day Lea telephoned Wrightsman in New York that the conference on March 8 with the Bureau had been very satisfactory, but that the Bureau desired two or three pieces of additional evidence, including an affidavit from the accountant supporting the minutes, which affidavit he would obtain in Houston. This whole statement was, of course, false.

Wrightsman was told by Korner on March 11 what had happened at the Bureau. He caused an investigation to be made, including a questioning of Lea by Mr. Peddy, plaintiff's counsel, who had had previous experience as a prosecuting attorney. Lea maintained his innocence, but, so far as appears, offered no explanation of the abundant evidence of his guilt. Mr. Blair, of plaintiff's counsel, asked the Bureau to cause an investigation to be made by the Special Intelligence unit. This was done, and the agent reported that he was unable to fix the responsibility for the alteration of the minutes.

In 1937, after plaintiff learned of the report of the agent of the Special Intelligence unit, it again began to press its claim, not relying, however, on the forged minutes. The claim was finally rejected and this suit followed. Our question is whether plaintiff corruptly attempted to practice fraud in the proof or establishment of its claim for a refund of the taxes here in question.

Lea, a high ranking official of plaintiff and authorized to handle this tax claim for plaintiff, was, as Secretary of the corporation, familiar with corporate minutes, and, as a former federal revenue officer, familiar with tax matters. After this claim had been pending for two years, Lea proceeds to produce, as needed, documentary proof of the claim. The first document is a statement signed by plaintiff's president stating that there are "numerous" 1929 minutes supporting the claim. This statement is deliberately false and its authorship is unquestioned. The next document is a forged minute. Lea testifies that he does not remember how or by whom it was discovered. An earlier inconsistent statement by Lea, later testified to by counsel for plaintiff, attributing the discovery to "some clerk" is not inquired into by plaintiff in cross-examining Lea. So the only evidence is that Lea produced it, and has no recollection of the circumstances.

The third document is another forged minute, manufactured by destroying a page of genuine minutes after having copied its contents on to a new sheet, and adding the spurious writing in a space carefully left for that purpose. A further attempt to cover the difference in typing, which could have been discovered only by an expert, was made, but because it left discoverable traces, was abandoned after a few lines. This document was produced by Lea, by the device of asking a bystander to look for it, who, of course, readily found it.

The two sets of forged minutes are produced from the place where any person, even without the special qualifications which Lea had as a corporation Secretary and a tax expert, would have looked first. They are not produced until the Government has stated specifically that this kind of evidence is essential, though anyone would have known from the beginning that this kind of evidence would be of

great value. The second, and more specific of the documents is not produced until after the first has been rejected by the Government as insufficient, and is produced, on December 21 from the small source in which, Lea said on December 5, he had searched and found nothing. His saying so on December 5 was damaging to his case, exposed as a falsehood President Wrightsman's letter of October 16, and was true, though he stated the contrary to Korner two days later. The document produced on December 21 met with exactness the requirements which were outlined to him on December 5 by Government attorneys.

Now Lea stands silent and explains nothing. Yet we are asked not only to overlook the undenied falsification contained in President Wrightsman's letter of October 16, but to suppose that Lea did not forge, or have guilty knowledge of the forgery of the two sets of spurious minutes which he produced as he thought they were needed. Fraud becomes impossible of proof, and cheap indeed, if nothing but a confession by the one obviously guilty will prove it.

As to the possibility that these forgeries were committed by someone else, we can only say that, giving imagination free rein, as we have no right to do, we can conjure up no other possible explanation of these events. No one else had any motive, any inclination, or any opportunity, to forge these minutes. The defendant has proved its plea of fraud, and plaintiff's claim is forfeited.

WHITAKER, *Judge*, concurs in the above opinion.

JONES, *Judge*, concurring:

I concur in the result. Undoubtedly there was attempted fraud. The record makes that fact certain. The difficulty is in identifying the one who is responsible. The finger points strongly to one of the officials of the company. While it may not rise to the dignity of a charge, it certainly does not sink to the level of a mere suspicion; and it is certain that officials of the company presented at least one of these resolutions to the Commissioner of Internal Revenue as unquestioned when they had every reason to know, and at least one of them knew, it was not genuine.

To have the resolutions of January 7, 1930, and May 22, 1929, bob up serenely and so surprisingly, after several

years' search for proof had failed to disclose them and just when they were needed, should have been sufficient to cause even an interested party to stop long enough to make a thorough checkup. Any sort of investigation would have disclosed the spurious character of the resolution of May 22.

The issue of fraud which reaches the courthouse is rarely susceptible of direct proof. Usually it must be shown by circumstances. The circumstances of this case are so strong as to preclude any other reasonable conclusion than that there was attempted fraud and that some of the officials of the company knew, or had reason to know, that the resolutions were not authentic. Instead, they submitted as unquestioned, and without any effort to determine their authenticity, these clinching resolutions that had so strangely appeared. It is significant that the resolutions did not even tally. The resolution of January 7, 1930, purported to order a survey to determine a question which the resolution of May 22, 1929, recited had already been settled. Previous inquiry had revealed their nature, but in their anxiety to further their cause responsible officials of the company chose to present them to the Bureau of Internal Revenue as bona fide.

True, the officials of the company made a thorough investigation later, but that was after the Bureau had challenged the resolutions.

In the circumstances I think the plea in bar should be sustained.

WHALEY, *Chief Justice*, dissenting, with whom LITTLETON, *Judge*, concurs.

In my opinion the special answer and plea of fraud should be denied.

I am unable to agree with the majority that fraud has been proved by the clear and convincing evidence universally required in cases of this character and am unwilling to brand an individual as the perpetrator of a fraudulent act on the basis of presumptions, suspicions, and contradictory circumstantial evidence.

Whether fraud is practiced or attempted to be practiced is a question of fact which must be established by clear and

convincing evidence and fraud is never to be presumed. It may be circumstantial but the circumstances themselves must be clearly proved and such evidence must be persuasive. Where circumstantial evidence is relied upon to establish a fact the circumstances must be proved, and not themselves presumed. When the evidence leaves a fact in the realm of speculation and conjecture it cannot be rightly found. *C., M. & St. P. R. R.* v. *Coogan*, 271 U. S. 472, 477. *United States* v. *Ross*, 92 U. S. 281, 284; *Manning* v. *Insurance Co.*, 100 U. S. 693, 698. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient. *Lalone* v. *United States*, 164 U. S. 255 The burden of proving fraud is on the party asserting it and the inquiry must therefore be whether defendant has satisfied the court by clear and convincing evidence of the charges made.

For many years prior to 1929 plaintiff had been engaged in the refining of petroleum in which business it had installed and was using using certain Burton stills. During 1929 plaintiff's officers and directors gave consideration to further economical use of certain of these stills in its business and reached the conclusion that they were obsolete. In filing its Federal income tax return for 1929, no deduction was claimed for the obsolescence of these stills and they remained on the books as assets at least until 1932. However, in filing its returns for State and County tax purposes for 1929, the value of these stills was deducted in determining the value of its property and its State and County taxes were paid on that basis. An examination of these State and County tax returns shows the identical stills with which we are concerned listed as obsolete. These returns were filed in 1929 long before the present controversy arose and they were filed by the officers of the old company some three years before the present claims for refund were ever considered. That was three years before Lea ever became connected with the company. These facts abundantly substantiate the contention of plaintiff that corporate action and consideration was given to the obsolescence of these stills in 1929 even though not actually recorded in the minute books when the action was taken.

In 1932, after a change in ownership and management of plaintiff had taken place about March 1932, plaintiff filed claims for refund in which among other things a deduction was claimed for the obsolescence of certain stills designated as batteries 5, 6, 7, 11, and 12, the same batteries which were charged off in the State and County tax returns.

It is significant that the claims were recommended for allowance by three different parties, namely, the revenue agent, the valuation engineer, and the Income Tax Unit which reviewed their findings. The revenue agent and valuation engineer not only examined the properties and satisfied themselves of the fact of obsolescence but also interviewed the old officers and found that the requisite acts and events had occurred necessary for the allowance of the deduction under the statute and regulations.

It was after this approval that the attorneys in the General Counsel's Office, to whom the certificate of over-assessment had been forwarded for final review, asked for further substantiating evidence in the form of corporate minutes and in response to that request the questioned minutes were submitted under the circumstances set out in detail in the findings. Here it should be observed that the minutes were not required under the statute for the allowance of the claims; obsolescence is a question of fact which can be proven by any satisfactory evidence. Admittedly there were suspicious circumstances connected with the presentation of these minutes which all parties recognized from the very outset. When these suspicions were aroused, plaintiff's responsible officers began a most searching inquiry to find who was responsible for the act complained of. In their painstaking investigation they had assisting them Judge Evans, a former president of the American Bar Association and a man of the highest repute and standing, Mr. Peddy, their own general counsel who had had long experience as a Federal and State prosecutor, and their local tax counsel in Washington. In addition, they employed a well-known handwriting expert who made a report after examining the minutes. The man, Lea, now named by the majority as the perpetrator of the act was faced by Mr. Peddy with all of the evidence which had been collected and accused of the

act. He not only denied the act at that time but likewise denied it when called as a witness by defendant in this proceeding. Mr. Peddy testified that after a most searching grilling of several hours he was not convinced that Lea had committed the act. I cannot read the testimony of Mr. Peddy and Mr. Wrightsman, plaintiff's president, without being convinced of the thoroughness of their efforts and the sincerity of their conviction that it had not been established to their satisfaction that Lea had changed or forged the minutes.

After it had been unsuccessful in its efforts to solve the problem, plaintiff not only asked the Internal Revenue Bureau to make a thorough investigation through all the forces at its command but also turned over to the Bureau all the evidence which it had collected. Such acts on their parts are inconsistent with the suggestion by the majority that officials of the company, other than Lea, might well have been connected with the act. Guilty parties do not usually ask to be investigated. The Bureau proceeded with investigations by the Special Intelligence Unit and the Federal Bureau of Investigation, and these investigators with all of their experience in matters of this kind and the resources at their command were likewise unable to satisfy themselves who was responsible for the act in question.

After these fruitless efforts by plaintiff and by the Bureau, plaintiff asked the Bureau to reconsider its claim in the light of the entire record, and with all of these facts before it a committee of attorneys for the General Counsel of the Bureau recommended the allowance of the claim. It is true that the claim was never allowed but in none of the letters from the Bureau denying the claim is there any suggestion that the denial is on account of these so-called fraudulent minutes.

Substantially the same persons were interviewed in these investigations who testified in this proceeding and substantially the same documentary evidence was considered in these investigations as has been presented in this proceeding. I have examined this evidence most carefully and I am unwilling to say that the party has been identified who changed the minutes and thus place the stamp of a criminal

on him. The circumstances are not connected, and must be largely assumed, and the suspicions become vague and contradictory when the evidence as a whole is considered. The preponderance of evidence is not enough. The rule governing this case is one between the greater weight of the evidence in civil cases and beyond a reasonable doubt in criminal cases. The mind must be satisfied the fraud was committed or attempted to be committed. An element of substantial doubt permeates the evidence.

One of the many factors which makes the solution difficult is the open hostility of the old officers, who were in charge of the affairs when the minutes would have been adopted and recorded, toward the present officers of plaintiff. We find them signing affidavits in support of the minutes, withdrawing those affidavits, and also suggesting that they would aid the plaintiff for a money consideration. We also have employees of the old company who were discharged by plaintiff when the change in corporate entity took place, some of whom were not kindly disposed towards plaintiff. In addition we have the accountants who had made an examination of the books of plaintiff and on whom it would be a reflection to have overlooked the minutes in question. Their testimony is far from convincing and smacks of inconsistency. One of them was discharged by an accounting agency after this investigation.

To say, as does the majority, that the evidence is clear and convincing that Lea changed the minutes, it is necessary to consider only the favorable parts of the record and overlook that which is unfavorable to such a position. The most that can be said is that certain evidence indicates the possibility that the individual named by the majority could well have committed the act, whereas much doubt is cast on its sufficiency by other evidence. Under such circumstances, I am unwilling to say either that this individual did the act or that it was done by someone in a position of responsibility with plaintiff. Too many possibilities exist that some other persons not in a position of authority or responsibility may well have done the act and the corporation innocently presented the minutes without knowing they were genuine. To apply the harsh rule of forfeiture of plaintiff's claim, which

responsible agencies of the Bureau have recommended for allowance, when the evidence is so wide the mark of being clear and convincing, transcends my idea of justice and results in a gross inequity to which I am unwilling to subscribe.

PITT RIVER POWER COMPANY (A CORPORATION) v. THE UNITED STATES

[No. 45588. Decided December 7, 1942]*

On Demurrer

Flood control; taking of private property for public use.—Where plaintiff sues for the value of land that it alleges will be flooded when a Government dam is completed and also for the estimated reduced value of certain other lands which plaintiff alleges will not be flooded but will be damaged by the flooding of the adjacent land; it is *held*, following the decisions in *United States* v. *Sponenbarger*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271, that the petition does not state a cause of action and defendant's demurrer is accordingly sustained and plaintiff's petition dismissed. (See also *Poinsett Lumber and Manufacturing Company*, 91 C. Cls. 264, 266.)

Same; taking of land.—Where plaintiff's land is located on a stream that is tributary to the river upon which construction of the dam has been begun but not completed; and where no portion of such land has as yet been flooded and may never be flooded; it is *held* that there has been no taking of plaintiff's land or of any interest therein.

Mr. Carl A. Mead for the plaintiff. *Mr. Sanford H. E. Freund* was on the brief.

Mr. Newell A. Clapp, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

JONES, *Judge*, delivered the opinion of the court:

This case is presented on demurrer. The question is whether the construction plans and activities of the defendant, as alleged, show a taking of plaintiff's land or an interest therein.

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*Plaintiff's petition for writ of certiorari denied. See p. 809, *post*.

Plaintiff alleges that it is now and has been during the period involved the owner of land in the county of Shasta along the Pitt River in California; that the Pitt River is a tributary of the Sacramento River; that on December 2, 1935, the President of the United States, pursuant to the act of June 25, 1910 (36 Stat. 630), approved certain findings of fact by the Secretary of the Interior and his recommendation that the Central Valley Project be constructed as a federal reclamation project; that by the terms of the act of August 26, 1937 (50 Stat. 844, 850), the Congress transferred the jurisdiction over the expenditure of certain funds for the Central Valley Project from the Secretary of War to the Secretary of the Interior; that the Central Valley Project "is the contemplated set of dams, canals, reservoirs, and power stations on the Sacramento and San Joaquin Rivers, State of California. The principal dams and reservoirs are the Kennett or Shasta Dam and Reservoir and the Friant Dam and Reservoir. The construction and operation of the Kennett or Shasta Dam and Reservoir were intended to and will flood the lands along the Sacramento River and its tributaries many miles above the location of the dam, including a great part of the lands of Petitioner, above described, located along the Pitt River, a tributary of the Sacramento River;" that on October 19, 1937, under the direction of the Secretary of the Interior construction work was commenced on the Shasta Dam and had proceeded continuously to the date of the filing of the petition.

It is further alleged:

> IX. Upon information and belief, that part of the above-described lands of Petitioner, which will be flooded by the erection of the Kennett or Shasta Dam, has been taken, without the consent of the Petitioner, by the United States acting under and pursuant to its governmental powers.
>
> X. Upon information and belief, the other lands of the Petitioner, above described, which will not be flooded by the said project, have been damaged by the proposed erection of the Kennett or Shasta Dam and Reservoir and their value has been substantially lessened.
>
> XI. Upon information and belief, the riparian rights in Pitt River of Petitioner, including the right to make beneficial use of and to withdraw water therefrom, have

been taken without the consent of the Petitioner, by the United States, acting under and pursuant to its governmental powers.

It is further alleged that by reason of the facts stated the "Petitioner has a claim against the United States of America under an implied contract, for compensation for the value of its property and rights taken by the United States for a public use."

Plaintiff sues for the value of the land that it alleges will be flooded when the dam is completed and also for the reduced value of certain other lands which it alleges will not be flooded but which will be damaged by the flooding of the adjacent land. The claims total $6,000,000.

Under the principles laid down by the Supreme Court in the cases of *United States* v. *Sponenbarger*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271, we do not think the petition states a cause of action. See also *Poinsett Lumber and Manufacturing Company*, 91 C. Cls. 264, 266.

There has as yet been no taking of plaintiff's land or any interest therein. There may never be a taking. The plaintiff's land is located on a stream that is tributary to the river upon which construction of the dam has been begun.

The beginning of construction does not necessarily mean that it will be completed. The lands in question are located on a tributary stream. No portion of such lands has as yet been flooded. It is not certain that any part of them will be. It is anticipated that some of the lands will be flooded when and if the Shasta Dam is completed. However, the plans may be modified by the Chief Engineer with the approval of the head of the department. The height of the dam may be changed. The available funds may be withdrawn by act of Congress, or any supplemental funds needed to finish the project may be denied. The project may be abandoned or, for any one of a number of reasons, may not be completed in accordance with the original plan. Essential elements of a taking are lacking.

There has, therefore, been no taking of plaintiff's land or any interest therein and any action at this time is premature.

The plaintiff cites a great many cases. A careful analysis of them shows that they are inapplicable to the facts of this case.

For plaintiff's second cause of action it asserts a right to recover the diminished value of lands that will not be flooded when and if the dam is completed, but which it alleges will be injured by the flooding of other lands. For the reasons set out in the discussion of the first cause of action there exists no right to recover at this time.

It is not necessary for the court to pass upon the question of whether any damage to such lands as will not be flooded, if and when the dam is completed, would constitute a partial taking or would be mere consequential damages. None of the lands of plaintiff has as yet been flooded, and since it is not certain they will be, there is obviously as yet no legal damage to the land that will in no event be flooded. Suit, therefore, on the second cause of action is also premature.

Defendant's demurrer is sustained, and plaintiff's petition dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

CONSOLIDATED ENGINEERING COMPANY, INCORPORATED, FOR THE USE OF THE FULTON NATIONAL BANK OF ATLANTA, ASSIGNEE, v. THE UNITED STATES

[No. 43159. Decided February 1, 1943]

On the Proofs

Government Contract; ambiguity; agreement by contractor to carry out intent of defendant.—Where in a contract entered into by the plaintiff for the construction of a Government building there was an ambiguity with regard to the painting of the mechanical equipment that was to be supplied by a subcontractor; and where plaintiff, though fully aware of the ambiguity, did not seek a clarification of the inconsistent provisions but protected itself by a provision in the subcontract; it is *held* that plaintiff in legal effect agreed with the defendant, and required the subcontractor to

Syllabus

agree with it, to do whatever painting the defendant intended by the specifications if the language of the specifications might reasonably be interpreted to express such an intent, and plaintiff accordingly is not entitled to recover, since the defendant intended that the painting should be done as provided in detail in the specifications.

Same.—Where plaintiff was aware of an ambiguity, perhaps inadvertent, in the Government's invitation to bid; it is *held* that plaintiff could not accept the contract and then claim that the ambiguity should be resolved favorably to itself.

Same; meaning of contract plain from writings and drawings.—Where contract for Government building provided for two separate air compressor rooms; and where the specifications did not state the number of compressors to be installed but in describing the control panel in each room specified for each room two of each of the accessories to the compressors; and where the contract drawings made it plain there were to be two compressors in each room; it is *held* that from the writings and drawings the meaning of the contract was plain, the installation of two compressors in each of the two compressor rooms was no more than plaintiff was legally bound to do, and plaintiff is accordingly not entitled to recover.

Same; error of subcontractor.—Where contract for construction of Government building required that certain pipes be covered with canvas; and where subcontractor of plaintiff mistakenly covered additional pipes not required to be covered; it is *held* that there was no legal obligation on the part of the defendant to pay for this unrequested work and plaintiff is accordingly not entitled to recover.

Same; change of contract by defendant; failure to inform subcontractor of Bureau of Standards test.—Where the type of radiator valves proposed to be used by subcontractor in Government building failed to meet the Bureau of Standards test and was rejected by the Government architects; and where other valves submitted by plaintiff also were rejected; and where thereupon the architects directed the installation of a certain other type of valve, which had also failed to meet the Bureau of Standards test, of which failure the plaintiff was not informed; it is *held* that the action of defendant's representatives amounted to a change of contract and plaintiff is entitled to recover the additional cost incurred by the installation of such type of valve.

Same; specifications wrongly written.—Where subcontractor on Government construction job covered the boilers with the mixture of asbestos and Portland cement called for in the specifications; and where the defendant required the subcontractor to remove this covering and replace it with another mixture; it is *held* that the fault was the defendant's in writing the specifications wrongly and plaintiff is accordingly entitled to recover.

Same; claims for extra work withheld by agreement.—Where plaintiff made no claim for extra work until after the completion of the contract; and where it is found that there was an understanding with defendant's representatives that the subcontractor would follow the directions of the architects and withhold claims for extra work until after the job was completed; and where in accordance with this understanding plaintiff submitted a number of claims, including the claim for recovering boilers and others included in the instant case, all of which claims were duly considered on their merits by the architects who made adverse recommendations on them to the Treasury Department; and where after a hearing at which representatives of both parties appeared, said claims were rejected by the Department; it is *held* that the lateness of presentation of the claims did not foreclose plaintiff. *Thompson* v. *United States*, 91 C. Cls. 166, 179.

Same; improper connection of vents.—Where subcontractor furnished the architects a shop drawing erroneously showing the vents for a dishwashing machine connected with the ventilating system, contrary to good practice; and where such a connection was not called for by the contract, which contained no language specific to the problem; and where subcontractor, over his objection, was required by the architects on written order to make the said connection; and where the arrangement did not work and the connection was later removed; it is *held* that plaintiff is entitled to recover.

Same.—Where, contrary to good practice, subcontractor was required by the defendant's architects to connect the vents from steam kettles to the ventilating system; and where the arrangement proved unworkable and the connection was removed; it is *held* that plaintiff is entitled to recover.

The Reporter's statement of the case:

Mr. A. S. Clay for the plaintiff. *Hirsch, Smith, Kilpatrick, Clay & Cody* were on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and incorporated under the laws of the State of Maryland, May 2, 1933, for the purpose of acquiring the business, assets, and capital stock of the Consolidated Engineering Company of the State of Delaware, and becoming its successor. In furtherance of this purpose the Delaware corporation on May 8, 1933, executed a deed conveying to the new corporation its

business, property, good will, bills, assets, accounts receivable, and the right to use its name, all subject to debts and liabilities of the grantor. The transfer from the old to the new corporation became complete, and its books, stockholders, directors, and officers remained the same.

As used hereinafter the term "plaintiff" designates either the Delaware or the Maryland corporation, as will appear from the context.

2. April 2, 1929, plaintiff entered into a contract with the defendant, the latter represented by Carl T. Schuneman, Assistant Secretary of the Treasury, as contracting officer, whereby plaintiff, for the consideration of $13,567,000.00, agreed to furnish all labor and materials, and perform all work required for the construction, complete, including approaches and all work within curb lines, of the Department of Commerce Building, Washington, D. C., excluding elevators and a dumb-waiter system and certain other items of work listed as not included in the specifications, all in strict accordance with designated specifications and drawings.

The work was to be completed within 1,100 calendar days after the date of receipt of notice to proceed.

A copy of the contract and pertinent specifications is in evidence and is made a part hereof by reference.

Articles 3, 5, and 15 of the contract provided:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be

determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

The contract also provided that the term "contracting officer" should include his duly appointed successor, or his duly authorized representative, and Article 15A of the specifications stated that the decision of the architects, as the duly authorized representatives of the contracting officer, as to the proper interpretation of the drawings and specifications should be final. Article 6 of the specifications provided that where the term "architect or architects" was employed it should refer to the firm of York & Sawyer, which term should also include their representatives. Fred M. Kramer represented the firm of York & Sawyer in connection with the contract in suit. As used in these findings the term "architect" or the term "architects" refers to the firm of York & Sawyer, their representatives, or representative.

3. The general work of furnishing and installing plumbing, heating, and ventilation required by the contract was done by plaintiff through a subcontractor, Loftis Heating and Plumbing Company, this being the trade name of W. S. Loftis, an individual, to whom plaintiff let that work April 19, 1929.

4. Plaintiff made up a schedule of contemplated progress, in which it indicated completion in much less time than that allowed by the contract.

5. *Painting.*—Article 5 of the specifications provided:

> 5. *Work not included.*—The following items of work will not be included in this contract:
>
> Models, Decorating and all Painting except all shop coats for all trades and field painting of structural steel,
>
> * * * * *

In the section of the specifications devoted to the subject of non-conducting covering appear the following articles:

> 876. PAINTING.—All piping run in or through concrete, cinder fill or tile floors shall be given one coat of acid-resisting paint having a bitumastic base. All exposed threads on galvanized pipe throughout the building shall be given one coat of same acid-resisting paint.
>
> 877. After specified tests (except smoke test) have been made all iron work including piping (except that to be covered) shall be given two coats of lead and oil paint. Galvanized pipe shall be varnished before being painted.
>
> 878. All nonconducting covering shall be given two coats of cold water paint, white or light colored. During the painting of pipe covering the bands shall be removed and replaced when paint is dry.
>
> Galvanized piping in ground shall be painted one coat of asphaltum.
>
> 879. Finishing tints shall be as directed by architects, but various colors to designate the different services (hot, cold circulating, etc.) will not be required, but at each connection the lines are to be stencilled with the initials of the service as H. W. for Hot Water, etc.

In the section of the specifications devoted to the subject of plumbing Article 681 reads as follows:

> 681. *References.*—In this section of the specification references to pages, plates, etc., mean plate numbers, pages, etc., in the United States Government Master Specification for plumbing fixtures (for land use) Federal Specification Board No. 448 which is also a part of this specification, and a copy of which may be secured on application to the architects.

Master Specifications No. 448 referred to no painting of any significance or materiality herein.

Under the heading of "Heating Apparatus, Boiler Plant, and Equipment" the specifications in Article 1005 provide:

References in this portion of the specification to pages and paragraphs mean pages and paragraphs in the specification for standard heating materials, etc., for buildings under the control of the Treasury Department, office of the supervising architect, dated April 1, 1926, which is a part of this specification and a copy of which may be secured on application to the supervising architect.

Paragraphs 132–136 of the specifications of April 1, 1926, read:

132. All ironwork, including boiler, breeching, stack, pipes, fittings, hangers, pumps, tanks, etc., but excepting exposed radiators, exposed risers, radiator shields, and floor, wall and ceiling plates, must be painted.

133. Breeching and smokestack must be painted inside and out with one coat of red lead and two coats best quality graphite paint.

134. Boiler, pipes, fittings, hangers, pumps, tanks, etc., must be painted with one coat of best quality black metallic paint suitable for hot surfaces, and all such ironwork which is not to be covered must be finished with one additional coat of paint. Pipes run in fireproof floor construction must be painted two coats of acid-resisting paint.

135. All pipe covering and all covering for breeching is to be painted with two coats asbestos paint, white or light colored. Pipe bands are not to be installed until final coat is dry.

136. The painting of radiators, exposed risers, radiator shields, etc., is not included in this specification.

Under that part of the general specifications relating to heating apparatus, boiler plant, and equipment, Article 1137 provided:

Painting.—Paint all iron work (except stock) and covering as specified on page 11, paragraphs 132 to 136, inclusive.

Paragraph 1196 of the contract specifications provided that all ventilating equipment should be painted in the manner specified in paragraphs 132–136 of the specifications of April 1, 1926, above quoted.

Article 3 of the specifications reads as follows:

Master Specifications.—Specifications referred to herein by number are the latest issues, including re-

> visions and addenda, of U. S. Government Master Specifications for materials. They are not furnished to bidders, except upon request, for the reason that they were prepared in collaboration with material producers and it is assumed that producers are familiar with their requirements. Copies may be obtained by bidders upon request to the Supervising Architect, indicating by number the specification desired.

During the negotiations which resulted in his contract with plaintiff, and in making his estimates of cost, Loftis had considered the amount of painting required under the contract specifications. Loftis had discussed the matter with plaintiff and it was agreed that Loftis was to do all the painting required by the plumbing, heating, and ventilating sections of the contract specifications. To avoid any misunderstanding, the following provision was included in the contract between Loftis and plaintiff:

> It is also understood and agreed that all painting referred to in these particular paragraphs and these Addenda specified to be done by the Heating or Plumbing contractor, is to be done by this subcontractor.

On the ground that such work was included in its contract, the architects demanded that plaintiff paint pipe lines, where exposed, in compliance with the general scheme of finish, all ducts, whether covered or bare, in compliance with the general finish of the room they were passing through, and fans, motors, ventilating units, sewage ejectors, and other machinery, all in addition to shop coats.

Loftis protested to plaintiff against doing this work, on the ground that it was not included in its own contract or in plaintiff's contract with the Government, particularly under Article 5 of the specifications, and plaintiff on May 29, 1931, forwarded the protest to the architects for a ruling. On June 2, 1931, the architects advised plaintiff by letter that the painting in question was included in plaintiff's contract. Thereupon Loftis complied with the ruling and did the painting.

The defendant's representatives, in writing the specifications, intended to require the contractor to do the painting which plaintiff's subcontractor did, and for which plaintiff now sues.

Paragraph 15A of the specifications provided in part:

> The decision of the architects, as the duly authorized representatives of the contracting officer, as to the proper interpretation of the drawings and specifications shall be final.

The fair and reasonable cost of the painting was $11,568.24, exclusive of plaintiff's overhead and profit, a fair and reasonable allowance for which is 10% of cost for overhead, and 10% of cost and overhead for profit. This allowance is applicable also to all of the other items of cost for which plaintiff is suing, except that relating to radiator valves.

6. *Air Compressors.*—The plans and specifications provided for air compressors to be used in the sewage ejection system. Article 784 described the required compressor. Article 778 stated:

> There will be two separate systems of air compression, designated by Nos. 1 and 2. Each system to be capable of compressing 100 cubic feet of air per minute against a gauge pressure of 80 pounds into the air receiver tank located above compressors. The above compressors to be from one manufacturer.

Plaintiff was to furnish and install these compressors in two rooms in widely separated locations in the building. The number of compressors to be installed in each room is not stated in the specifications. Article 2 of the contract provided that anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, should be of like effect as if shown or mentioned in both. The pertinent contract drawings, which are made a part hereof by reference, are the defendant's Exhibits 8, 9, 10, and 11. Exhibit 8 shows two compressors in one room, with an arrow pointing to each, and the plural "Compressors" as the legend. Exhibit 9 shows two compressors in one room, although the legend "Air Compressor" is in the singular. Exhibit 10 shows two compressors in one room, and each compressor bears the separate legend "Air Compressor." Exhibit 11 shows two compressors, with no legend. Paragraph 804, describing the control panel in each room, specified for each room two of

each of the accessories to the compressors, such as automatic starters, pressure gauges, etc.

The subcontractor made arrangements to furnish and install two compressors only, one in each room. The architects demanded that plaintiff furnish and install four compressors, two in each room. Plaintiff forwarded to the architects a letter from the subcontractor claiming that the contract called for two compressors only, and asked for a ruling. The architects ruled that four compressors were required by the contract. Plaintiff complied with the ruling and furnished and installed four compressors. In a letter dated January 20, 1933, the Assistant Secretary of the Treasury sustained the architects' ruling.

The cost of furnishing and installing two of the compressors was $3,125.00, which is not in excess of a fair and reasonable amount.

7. *Sewing on of canvas pipe covering.*—By their own mistake Loftis' employees sewed an eight-ounce canvas covering over certain heating pipes and reducing valve stations in the attic and mechanical rooms in the basement. Before all the heating pipes and reducing valve stations were so mistakenly covered Loftis discovered the error. Such a covering was not required by the contract, but did constitute an improvement and involved extra cost to Loftis. The additional covering was not requested by the defendant.

Plaintiff did not keep a record of the cost of this additional work. February 9, 1932, plaintiff informed the architects that the subcontractor was claiming additional compensation in the amount of $10,450.77 for the sewing on of the canvas covering and asked that the claim receive consideration by the Treasury Department.

May 27, 1932, the architects advised plaintiff that their own estimate of the cost of the additional work was $1,734.56 and that they were willing to recommend to the Treasury Department the allowance of a claim for that amount. A claim was accordingly submitted for $1,734.56 plus 10% of cost for overhead and 10% of cost and overhead for profit. The claim was considered and rejected by Assistant Secretary of the Treasury Ferry K. Heath, January 21, 1933, on the

ground that no change order had been issued under Article 3 or Article 5 of the contract. The claim has never been paid.

The sum claimed, $1,734.56, is an estimate only, made in the absence of cost records, but is reasonable in amount.

8. *Radiator thermostatic control valves.*—With regard to the valves for radiators the specifications provided:

> 1104. RADIATOR VALVES.—Furnish and install a valve on the steam connection of each radiator. Each radiator valve shall be of the automatic thermostatic type, capable of maintaining the room temperature within one degree, plus or minus, of the temperature for which it is set and shall be easily adjustable for the desired temperature.
>
> 1105. Each valve shall have a composition handle and ground joint union tail piece. All metal parts shall be nickel plated. The valve body shall be made of the best quality red brass composition, and the disc shall be of a material not affected by moisture or steam.
>
> 1106. The valves shall be packless, the packless feature consisting of a diaphragm or series of diaphragms or a hollow metal bellows forming a complete metal seal between the interior and the exterior.
>
> 1107. The valve shall be adapted to installation on all radiators without architectural or mechanical changes.
>
> 1108. All valves shall be rugged enough to withstand all normal abuse in operation, and shall be guaranteed for a period of three years from the date of authorization of final settlement under this contract.
>
> 1109. These valves shall be submitted for test to the Bureau of Standards prior to order.

Pursuant to contract requirements plaintiff submitted to the architects for test by the Bureau of Standards an automatic thermostatic control valve, known as the "Sterlco." Theretofore on March 22, 1929, the subcontractor had received a quotation from the manufacturers of this valve of $41,000 for the valves necessary to fill the contract. The architects objected to the valve because of its mechanical construction and lack of adaptation for installation. The valve was redesigned to correct these deficiencies and the architects delivered the redesigned valve to the Bureau of Standards for testing. Upon testing, the valve failed to

meet operative requirements as to range of temperature control, and it was rejected by the architects.

Plaintiff submitted other valves, which were rejected for failure to comply with structural requirements, regardless of operation. Thereupon, on October 28, 1930, the architects directed plaintiff to submit for test a valve manufactured by the Direct Control Valve Co. and known as the "Direct Control Valve." On this valve neither plaintiff nor Loftis had invited or received a quotation. The Direct Control Valve was submitted to the architects and by the architects to the Bureau of Standards for testing. January 20, 1931, the Bureau of Standards reported to the Treasury Department the results of this test, which indicated that the Direct Control Valve had also failed to meet operative requirements as to range of temperature control.

February 26, 1931, the subcontractor, not having been advised that the Direct Control Valve had so failed, notified plaintiff, who in turn notified the defendant, that the necessary number of valves had been ordered from the Direct Control Co. March 3, 1931, the Assistant Secretary of the Treasury wrote the architects authorizing a modification of the contract requirement on range of temperature control, and directing the installation of the Direct Control Valve. March 5, 1931, the architects wrote plaintiff acknowledging receipt of the information that the subcontractor had placed the order for the Direct Control Valve, and stating:

> Under date of March 3, the Treasury Department has written us to the effect that we are authorized to direct you to order the installation of the Direct Control Co.'s valve.
>
> In our opinion, this matter is now closed, and there is no reason for further delay on this item.

The subcontractor objected to this direction, unless guaranty of performance was waived, and also the test by the Bureau of Standards in case it was adverse, and this objection was communicated by plaintiff to the architects. Without communicating the result of the test to plaintiff or waiving the guaranty of test or performance, the architects, on March 16, 1931, ordered installation of the Direct Control Valve without increasing the contract price, and plaintiff furnished and installed that valve.

The cost to plaintiff's subcontractor of furnishing Direct Control Valves was $55,000, an increase of $14,000 over the price of the Sterlco Valves. Plaintiff's bid reflected its subcontractor's bid, which was based on a price not in excess of $41,000.

There were no valves in the market that complied with the original terms of the specifications as to range of temperature control.

The contracting officer issued no order increasing the contract price to cover the increased cost of installation of the Direct Control Valve.

9. *Recovering boilers.*—The boilers were covered by inch-and-a-half magnesia blocks, wired in place, which were substituted, by consent, for plastic material. Over these blocks there was a finish coating. This coating in good practice is made of a mixture of about one-quarter of Portland cement to three-quarters of asbestos, by volume. Plaintiff used a mixture of one-half Portland cement and one-half asbestos, by volume. The coating, so applied, developed cracks because of the excess of cement and, February 13, 1932, the architects served on plaintiff the following order:

> Confirming verbal instructions, the covering on boilers does not meet with contract requirements and all the loose covering and hard smooth surface which is improperly bonded to the asbestos block shall be removed and replaced in a thoroughly workmanlike manner.

The specifications provided:

> 1135. The breeching is to be covered with plastic material not less than 1½″ thick, reinforced with wire netting, and finished with a hard, smooth surface. A workmanlike finish will be required around dampers and cleanout doors. A 1-in. air space must be maintained between the breeching and the covering by the use of steel spacers properly installed (not over 3 inches on centers), and attached to the wire netting.
>
> 1136. Boilers and drip tank shall be covered the same as the breeching, except that covering is to be 2 inches thick, and last ¼″ shall be one-half Portland cement. The air space may be omitted on boilers and tanks.

It is customary in specifications to specify a cement mixture by "parts," meaning parts by volume. To one skilled

in covering boilers with nonconducting insulation it would be apparent that a mixture of one-half Portland cement and one-half asbestos by volume would be unsatisfactory for the coating, due to its resulting hardness and inability to expand and contract without cracking. To such a person one-half Portland cement to one-half asbestos by weight would be a more satisfactory mixture, due to the fact that the greater specific gravity of Portland cement would result in a higher proportion of asbestos by volume. While the application of an improper mixture might have been discovered either by close supervision by Loftis or close inspection by the defendant, the cause of the error was the inaccuracy in the specifications.

Plaintiff recovered the boilers as required by the architects, at a cost of $905.14.

10. *Fan and motor foundations.*—The contract required the foundations for certain fans and motors to be of concrete blocks, with cork insulation to reduce vibration, and the drawings showed anchorage to the floor in such manner as to prevent shifting of motors and fans, which were connected by belts or couplings, all subjected to considerable strain under operating conditions.

Plaintiff furnished a shop drawing of the anchors it proposed installing. Plaintiff did not at first furnish and install any anchors and in operation the bases shifted. Plaintiff complained that the anchorage displayed on the shop drawing was difficult and expensive to fabricate. The architects agreed to consider and finally accepted a less expensive anchorage designed and proffered by the subcontractor, and it was installed.

The anchors were plates bolted to the floor at the corners of the fan and motor concrete foundations. Between these corner plates was a space which if not closed in would permit dust and dirt to collect under the concrete block, the concrete block being raised from the floor by spaced cork insulation. The architects, without increasing the contract price, required plaintiff to install strips between the corner plates, called in the record "dust strips". The architects ruled that these were required by the contract for a workmanlike job although not specifically mentioned therein.

The cost of furnishing and installing either the corner plates or dust strips is not proved.

11. *Galvanized caps on drip pipes.*—In the heating system there were certain drip-pockets, on the bottom of steam risers in kitchen and cafeteria. The plans called for the concealment of these pockets with access thereto through panels or doors. The architects, without a formal change order, required plaintiff to bring the drip pockets through the baseboard, with nipples and plugs or caps, so that they were exposed and accessible without the use of recesses and panels. In the heating system black iron was used and when so used it is customary to make it exclusive. Plaintiff adhered to the use of black iron in extending the drip pockets through the baseboard, using black iron nipples and black iron plugs or caps. After the black caps and nipples had been installed the architects were not satisfied with their appearance, and without a formal order required plaintiff to take them off and substitute galvanized caps and nipples, which plaintiff did.

There was a difference between the cost of furnishing and installing the drip pipes according to the specifications and the cost of furnishing and installing them as they were actually furnished and installed. The installation used, eliminating recesses and panels, was the cheaper method. There is no proof that plaintiff incurred any excess cost over that which would have been necessary under the specifications.

12. *Floor and ceiling plates.*—The contract did not provide that plaintiff should provide nickel-plated floor and ceiling plates set around pipes where they came through floors or ceilings. Plaintiff was prepared to furnish and install floor and ceiling plates of black iron conforming to the pipes around which they were to be set. The architect disliked their appearance, and without ordering the same in writing or increasing the contract price, required plaintiff to furnish and install iron plates that were nickel-plated, which plaintiff did, at a cost of $543.58 additional to that of uncoated plates.

13. *Clean-out plates.*—Article 715 of the specifications, under the caption "Plumbing," provided that all clean-outs

should be accessible, be extended to the floor or wall, be finished with a polished brass plate and brass plug with recessed nut, and where the clean-outs occurred in finished toilet rooms they should be finished the same as other pipe in the same room.

Article 898 of the specifications provided that all exposed metal in conjunction with plumbing fixtures should be polished solid white metal, "as previously specified."

Article 544 of the specifications provided:

> *Finish.*—All exposed hardware in toilet rooms, kitchen, cafeteria, slop sink closets, and toilet room vestibules, shall be of white bronze, polished finish. All other exposed hardware shall have polished natural bronze finish without lacquer.

Plaintiff protested that nothing in the specifications required it to put chromium plating on the clean-out plates. This item was included in a duly authorized extra "for coating with chromium plating all the white metal specified in connection with the plumbing," and the architect so held.

14. *Cleaning traps.*—In the heating system at various points were located so-called "traps," the function of which was to control the return of the condensate arising from cooling-off of the steam. In them also incidentally dirt or sediment collected from the pipes.

On the first trying out of the heating system it was discovered that a substantial number of these traps had their elements missing, or had elements of a wrong size. The architects thereupon required all traps to be cleaned and adjusted. During the second heating season, after the Government had taken over the system, it still did not work satisfactorily. The defendant made certain adjustments of its own, in instances changing vacuum control to float control, and with those changes the system still failed to operate efficiently. The Government required plaintiff again to go over the traps and replace, clean or repair the traps according to their condition. Plaintiff did so and changed the float control back to the vacuum control as contemplated by the specifications. In order further to improve the system, if possible, the defendant's engineers stripped the pipe covering from returns to the traps in an effort to cool

the returning condensate. The system was intended to work on a vacuum, and a differential in temperature was required to make it function properly and economically.

Article No. 14 of the specifications provided:

> 14. GENERAL GUARANTEE.—Unless otherwise specified under different trades, all work under these specifications shall be guaranteed for one year from the date of the authorization of final settlement under this contract. All guarantees embraced in, or required by this contract are subject to the terms of this paragraph, unless otherwise expressly agreed in writing by the parties to this contract. Wherever work is required to be guaranteed the contractor, whenever notified by the contracting officer shall immediately (1) place in satisfactory condition in every particular any of such guaranteed work, and (2) make good all damage to the building or grounds, or the equipment of contents thereof, if such unsatisfactory condition or damage develops within the period stipulated by the guaranty and is due to the use of materials or workmanship which is inferior, defective, or not in accordance with this contract, and must make good any work or materials, or the equipment and contents of said building or grounds, which are disturbed in fulfilling any such guaranty. In any case where, in fulfilling the requirements of this contract or of any guaranty embraced in or required thereby, this contractor disturbs any work guaranteed under another contract, he must restore such disturbed work to a condition satisfactory to said contracting officer, guarantee such restored work to the same extent as it was guaranteed under such other contracts. Upon the contractor's failure so to proceed promptly to comply with the terms of any guarantee under this contract or still running upon work originally executed by other contractors, the United States, acting through its duly authorized representatives, may (1) either have such work performed as the contracting officer shall deem necessary to fulfill such guarantees, or (2) allow such damaged or defective work or portion of the building or grounds, or contents or equipment of the building, or work disturbed in fulfilling guarantees, or guaranteed work, which shows such a condition as to make any such guarantee operative, to remain in such unsatisfactory condition; PROVIDED, that in either event the contractor shall promptly pay the United States such sums

as were (in the first instance) expended so to fulfill such guarantee, or as it would have been (in the second instance) necessary to expend to fulfill such guarantee. All guarantees under this contract shall run from the date of authorization by the Secretary of the Treasury of final settlement under this contract. Usual wear and tear and the results of accidents not chargeable to the contractor or his agents are excepted from the requirements of this paragraph. Everything done in the fulfillment of any guarantee must be without additional expense to the United States. The opinion of the contracting officer as to the liability of this contractor under any such guarantee or as to the satisfactory fulfillment or compensation for the non-fulfillment thereof shall be final.

Plaintiff claims reimbursement for labor and material used in the second reconditioning of the traps.

The contracting officer, under the circumstances, did not act unreasonably in requiring plaintiff to clean and check the traps a second time.

15. *Drain between colonnades.*—A part of plaintiff's work was furnishing and installing drains in the floor of the third-story colonnade. Plaintiff was prepared to supply a type of drain which complied with the specifications for that area.

The specifications did not provide uniformity for all drains. In order to effect such uniformity the architects ordered a type of drain for the third-floor colonnade different from that tendered by plaintiff. The type desired by the architects was cheaper than the drain plaintiff proposed to install.

In August of 1930, plaintiff received the following communication from the architects:

Under date of August 8, the Loftis Co. have asked for confirmation of our instructions that the type of roof drain located at the third floor level between colonnades is to be the same type as the roof drains to be installed on the 7th floor roofs.

Our instructions to the Loftis Co. some 8 months ago, when they submitted the Josam type of drain, was that we prefer to have the built-up type with the cast bronze strainer, the same as is being installed on the 7th floor,

and that this substitution was to be covered in letter form through you.

Will you kindly see that the copper pan drains with the cast bronze strainer are installed and that the extras or credits involved in this substitution are taken care of?

There is no evidence that the architects followed up the matter by any formal order for a change, with increase or decrease in contract price.

There is no adequate proof that plaintiff or Loftis sustained any loss or became liable therefor due to any excess cost in furnishing and installing the drains demanded by the architects.

16. *Temporary heating.*—The Government took over the steam-heating plant December 4, 1931. Prior thereto the Government had partially occupied the building, and temporary heat had been supplied by plaintiff to protect the building from cold and enable the men to go forward with the work of construction and finishing.

Immediately prior to December 4, 1931, plaintiff, in accordance with the contract, ran a 72-hour test of the entire boiler plant and heating system, after which plaintiff's men engaged on the test were withdrawn and a Government force substituted.

The Government had a force of its personnel in the building in November of 1931. Heat therefore was necessary to the Government and the architects required plaintiff to heat the building for the period beginning November 23, 1931, and ending December 1, 1931, with the exception of November 26, 1931.

The cost of heating the building for the period beginning November 23, 1931, and ending December 1, 1931, was $2,054.81. The operation of the boiler plant during this period served three purposes: first, as a work-out preliminary to the final test; second, as a means of providing heat for the working force of the Government at that time ensconced in the building; and third, to keep the building heated for the final work being done by plaintiff. There is nothing in the record to show what proportion of this

cost is attributable to such of the Government activities in the building as were not related to the contract work.

17. *Cafeteria: Tray rail extension.*—The architect desired, among other changes in and additions to the cafeteria of the building, a three-foot extension of the tray rail, and in response to a request by the architects for a proposal by plaintiff covering these changes and additions, including extension of the tray rail, plaintiff furnished a proposal September 9, 1931, naming a total $27,792.00 for all this additional work, and the proposal was accepted by the Assistant Secretary of the Treasury October 13, 1931.

There is no proof that plaintiff has not been paid for the work covered by the proposal and acceptance.

18. *Cafeteria: Monel metal tray rails.*—In the cafeteria plaintiff installed certain tray rails. After one of the tray rails had been installed the architects were not satisfied with it because although it conformed with the specifications it was nickel-plated and did not match a monel metal tray rail installed by another contractor under a separate contract for enlargement of the cafeteria. The architects, without issuing a formal order or adding to the contract price, required plaintiff to remove the nickel-plated rail and substitute a monel metal tray rail. The architects were insistent that the change be made more expeditiously than called for by the contract, in order that the cafeteria might be put into service before completion of the building. Plaintiff made every effort to comply with the architects' desire for speed and effected the change forthwith.

The cost of the alteration is not satisfactorily proved.

19. *Cafeteria: Vent pipes for dishwashing machine.*—The contract provided that plaintiff should furnish and install a dishwashing machine. This machine as furnished had two vents for the steam exhaust, without threads for any connection that might be made therewith. Plaintiff furnished the defendant a shop drawing showing these vents connected through the hood to the ventilating system of the building.

Article 999 of the specifications provided:

> All the apparatus having steam, gas, plumbing, waste, electric and ventilation connections, also electrical

features and refrigerating coils for refrigerators, shall be set up in position and properly connected.

It was contrary to standard practice to connect these vents with the ventilation system. The vents were not intended for that purpose by the manufacturer and plaintiff's shop drawing was erroneous in that respect. Plaintiff did not make the connection and objected to doing so. The architects then demanded, in writing, installation in accordance with the shop drawing, claiming it to be a contract requirement. Plaintiff then complied with this demand. After the dishwasher had been put into use the connection was found to be impracticable, owing to the accumulation of condensation from the steam, and the architects ordered the connection removed, allowing the steam to pass into the atmosphere of the room, thence to be drawn off by the ventilating system, after which the trouble disappeared.

The cost to plaintiff of the connection from the dishwasher to the ventilating system was $103.00.

20. *Cafeteria: Vent pipes for steam kettles.*—Under the contract plaintiff furnished and installed steam kettles for cafeteria use. They were equipped with threaded vents so that the vents could be connected with means for taking up the steam exhaust. The architects demanded that plaintiff connect these vents directly with the ventilating system, claiming such a connection was required by the contract. Plaintiff complied with the demand. Such a connection was not in accordance with good practice, owing to the danger of dirt and vermin coming down from the ventilators through the connection back into the steam kettles when the latter were out of use for the time being.

The cost of making the connections demanded by the architects was $475.00.

21. *Cafeteria: Monel metal slides in hoods over range and steamers.*—Article 1180 of the specifications provided:

> *Ratchet Dampers.*—Ratchet dampers shall be installed in connections between hoods and duct work as indicated. Each ratchet damper shall consist of a substantial cast iron frame, cast iron hinged leaf and a ratchet device for holding the leaf in a number of open positions. The ratchet device shall lock the leaf

effectively against the suction of the duct, and shall be operated from the exterior.

These dampers were to operate in the ceiling of the hood and were designed to control the air velocity in the ventilation. There were 13 of them shown by the drawings.

Plaintiff's and the defendant's officers consulted and devised a substitute scheme for controlling the air velocities, consisting of a simple slide, of monel metal, operated by a poker or similar handy article, doing away with the mechanism involved in a ratchet damper, and plaintiff submitted a shop drawing without the ratchet damper. The monel metal slides were furnished and installed by plaintiff. There is no proof that plaintiff incurred any additional expense by reason of the substitution.

22. *Cafeteria: Overtime.*—The building was partially occupied by the Government before its completion. In order to afford cafeteria accommodations for the Government employees in the building the architects demanded that plaintiff make the cafeteria ready for use by January 4, 1932. In order to do this plaintiff kept a force on the job outside of the regular daytime work-day hours, whether by the use of extra men or of men working longer than the regular day with overtime pay does not appear. The cafeteria work was rushed and completed well before the contract time. There is no satisfactory proof of the extra expense, if any, that plaintiff was put to by reason of completing the cafeteria in advance of the agreed time.

23. By mutual agreement, plaintiff was authorized to postpone the submission to the architect of claims such as those here involved until after the completion of the work.

The claims presented in this suit originated with plaintiff's subcontractor, Loftis Heating & Plumbing Co., and were submitted by that company to plaintiff.

June 20, 1932, plaintiff forwarded to the architects, York & Sawyer, the following claims, among others not herein pressed, the several letters of transmittal concluding:

> We shall be pleased to submit, or have the Loftis Company submit any further information relating to said claim that you may desire.
>
> Awaiting your advice in the premises, and thanking you for the favor, we remain, etc.

Finding	*Subject*
8	Control valves.
9	Recovering boilers.
10	Fan and motor foundations.
11	Galvanized caps on drip pipes.
12	Floor and ceiling plates.
13	Clean-out plates.
14	Cleaning traps.
15	Drain between colonnades.
17	Tray rail extension.
18	Monel-metal tray rails.
19	Vent pipes for dishwashing machine.
20	Vent pipes for steam kettles.
21	Monel-metal slides in hoods over range and steamers.

The architects considered these claims and in January, 1933, made adverse recommendations on them to the Treasury Department.

A hearing was held before the Assistant Secretary of the Treasury on all the foregoing claims, after their presentation, at which hearing appeared representatives of both parties. At this hearing the Assistant Secretary received the claims for further consideration.

After the hearing on the claims before the Assistant Secretary, and after they had been submitted to the Board of Awards, they were rejected by the authorized head of the Treasury Department. Plaintiff was so notified on June 5, 1934. The parties have stipulated that this was a final decision under Article 15 of the contract. The claims relating to painting, air compressors, overtime, and temporary heat were also presented by plaintiff to the Treasury Department and rejected by the authorized head of the department, and plaintiff was so notified June 5, 1934. None of the claims has been paid, except that relating to the extension of the tray rail, as shown in finding 17.

A general claim of plaintiff in the sum of $67,599.06 for alleged extra work on the plumbing, heating, and ventilation, the details of which are not shown, was denied by the Comptroller General of the United States, January 11, 1935.

24. During the progress of the work plaintiff's subcontractor, W. S. Loftis, or Loftis Plumbing & Heating Co., became indebted to The Fulton National Bank of Atlanta,

Georgia, because of certain loans made by that bank to the subcontractor to finance his work on the Department of Commerce Building.

By indentures dated February 16, 1931, and July 27, 1932, W. S. Loftis assigned to The Fulton National Bank any amount due to Loftis under his contract with plaintiff for work on the Department of Commerce Building.

Plaintiff herein seeks to recover for the actual benefit of Loftis or his assignee, The Fulton National Bank of Atlanta.

The court decided that the plaintiff was entitled to recover $16,452.33.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff is a Maryland corporation which is a successor to a Delaware corporation, the succession having taken place May 8, 1933, after the predecessor corporation had completed the construction of the Department of Commerce building under a contract with the United States. The predecessor corporation subcontracted the plumbing, heating, and ventilating work on the building to W. S. Loftis, who did business as the Loftis Heating and Plumbing Company. He assigned to the Fulton National Bank, of Atlanta, Georgia, any amount due him under his subcontract, as security for advances made by the bank to him. Loftis and the bank are the real parties in interest on plaintiff's side of this case. The term "plaintiff" is used to describe either the Delaware or the Maryland corporation.

Plaintiff's contract with the Government was dated April 2, 1929, and the price was $13,567,000. Plaintiff's subcontract with Loftis was dated April 19, 1929, and the price was $1,200,000. The building was completed within the contract time. Loftis was paid $1,239,400.03 by plaintiff, which sum included certain extras beyond the work originally subcontracted to him. He and the bank nevertheless claim, through plaintiff, considerable sums for work and materials which they claim were required of Loftis beyond what he in his subcontract and plaintiff in its contract agreed to do, and for which the defendant has refused to pay.

Such of these claims as plaintiff has seriously urged here will be taken up seriatim.

Painting

There was an ambiguity in the words of the writing making up plaintiff's contract with the defendant with regard to the painting of the mechanical equipment which fell within Loftis' subcontract. Paragraph 4 of the specifications called for the doing of all work necessary to completion of the building "except elevator and a dumb-waiter system and exclusive of those items of work which are specified as not included, as indicated on drawings and specified herein". Paragraph 5, in pertinent part, was as follows:

> The following items of work will not be included in this contract: Models, Decorating and all Painting except all shop coats for all trades and field painting of structural steel.

On the other hand, many pertinent paragraphs of the specifications provided in detail for the exact manner in which a complete painting job was to be done upon the pipes and equipment whose painting is here in question. The provisions of the specifications relevant to this question are quoted in finding 5. The inconsistency of Paragraph 5 of the specifications with these other provisions was so patent that it might well have evoked an inquiry from prospective bidders, including plaintiff, as to what the specifications really meant. Plaintiff, however, though fully aware of the ambiguity, instead of asking for a clarification, protected itself by discussing the question with Loftis when the subcontract was under negotiation, and insisting upon the following statement in the subcontract:

> It is also understood and agreed that all painting referred to in these particular paragraphs and these Addenda specified to be done by the Heating or Plumbing contractor, is to be done by this subcontractor.

We think that plaintiff, aware of an ambiguity, perhaps inadvertent, in the defendant's invitation to a contract, could not accept the contract and then claim that the ambiguity should be resolved favorably to itself. In these circumstances plaintiff in legal effect agreed with the defendant, and required Loftis to agree with it, to do whatever painting the defendant intended by the specifications, if the language

of the specifications might reasonably be interpreted to express such an intent. The defendant intended that the painting should be done as provided in detail in the specifications. That is what plaintiff bound itself to do, and Loftis' obligation was the same as that of plaintiff. Besides, it was provided in Paragraph 15A of the specifications that the decision of the architects as to the proper interpretation of the specifications should be final. Neither plaintiff nor Loftis has any just ground of complaint as to the painting.

Installation of Additional Air Compressors

The contract provided for two separate air compressor rooms, one in the north section and one in the south. The purpose of the compressors was to eject sewage from receptacles which were below the level of the city sewers. The specifications did not state the number of compressors to be installed, but Paragraph 804, describing the control panel in each room, specified for each room two of each of the accessories to the compressors, such as automatic starters, pressure gauges, etc. The contract drawings described in finding 6, each purporting to show one of the two air compressor rooms, make it plain that there were to be two compressors in each room. Defendant's Exhibit 8 shows two compressors in one room, with an arrow pointing to each, and the plural "compressors" as the legend. Exhibit 9 shows two compressors, though the legend, "Air Compressor", is in the singular. Exhibit 10 shows the two compressors as 9 does, and each compressor bears the separate legend "Air Compressor". Exhibit 11 shows two compressors, with no accompanying legend. Of the several references in the drawings and contract writings, all of which were to be taken into account in ascertaining the meaning of the contract, only the use of the singular word "Compressor" on the drawing which is the defendant's Exhibit 9 would have any tendency toward the construction of the contract for which plaintiff contends. Even on that drawing, the singular word in the legend was written across a figure of two compressors. We think the meaning of the contract was plain from the writings and drawings, and the in-

stallation of two compressors in each of the two compressor rooms was no more than plaintiff was legally bound to do. It may not, therefore, recover extra compensation for doing so.

Sewing on of Canvas Covering on Pipes

The contract required that certain pipes be covered with canvas. Employees of Loftis mistakenly covered additional pipes, and his superintendent did not notice that they were doing so. Loftis had the work stopped as soon as he learned of it. He claimed $10,450.77 for the extra work, and plaintiff asked that the claim be considered. The architects advised plaintiff that their estimate of the cost was only $1,734.56, and that they would recommend the allowance of a claim for that amount plus overhead and profit. This was done, but the Treasury Department rejected the claim because no change order had been given as required by the contract.

Loftis, by mistake, conferred upon the defendant an unrequested benefit by covering pipes which were not included in the contract. No legal duty to pay for this unrequested work arises out of these facts. The defendant was within its rights in refusing to pay for it.

Radiator Valves

The contract provisions relating to radiator valves are quoted in finding 8. Loftis had received, on March 22, 1929, a quotation of $41,000 from the manufacturers of the "Sterlco" valve, for the valves needed on this contract, and he submitted a valve of that make for test by the Bureau of Standards, as the contract required. The architect objected to the valve because of its mechanical construction and its shape, and the manufacturers redesigned the valve to meet these objections. As redesigned it was submitted to the Bureau of Standards for testing, where it failed to control the temperature within a range of one degree, as required by the specifications. The architects thereupon rejected the Sterlco valve. Plaintiff submitted other valves, but they were rejected for failure to meet structural requirements. On October 23, 1930, the architects recommended to the Treasury Department

that, since the valves plaintiff had submitted did not meet the specifications, the Government should proceed under Paragraph 660 of the specifications and designate a valve to be installed. They recommended that plaintiff be directed to install a make of valve whose trade name was "Direct Control." The Department, on October 25, instructed the architects to have the Direct Control valve submitted for testing by the Bureau of Standards, and plaintiff, being notified of this, submitted that valve for testing. On January 20, 1931, the Bureau of Standards made a report to the Treasury which showed that the Direct Control valve had failed to meet the test.

On February 26, 1931, Loftis, not having been advised that the Direct Control valve had so failed, notified plaintiff, and plaintiff notified the defendant, that he, Loftis, had placed his order for Direct Control valves. Thereupon the Department wrote the architects authorizing a modification of Paragraph 1104 of the specifications and directing the installation of the Direct Control valves. On March 5, 1931, the architects wrote plaintiff, directing him to use the Direct Control valves. Loftis objected, unless the defendant would waive the Bureau of Standards test and the guaranty of successful operation which was in the contract. The architects, without mentioning these requested waivers, again directed the installation of the Direct Control valve, and that was done, at a cost to Loftis of $55,000, as compared with the $41,000 which the Sterlco valves would have cost, and which was the amount which Loftis and plaintiff had estimated for this purpose when they had made up their bids.

We think that the defendant did not deal fairly with Loftis in the valve transaction. When the Direct Control valve failed to pass the Bureau of Standards test, the defendant's representatives made up their minds that the specifications had been written too rigidly, and that there was no valve on the market that would meet the specifications. They therefore decided to insist on the Direct Control valve which, their experience showed, would give the best all-around performance. This amounted to a change of the contract. But there were two parties to the contract, and Loftis, in plaintiff's right, was entitled to know

the relevant facts and to be consulted about the change, since he was to perform the changed contract. He was entitled to know that the Direct Control valve had failed to pass the test and was therefore, so far as the original specifications were concerned, no better than the Sterlco, though it cost $14,000 more. If he had known that, it is hardly likely that he would have willingly incurred the additional cost. He was entitled to know that the defendant, in directing him to install the Direct Control valve, was not acting pursuant to Paragraph 660 of the specifications, which would have permitted the defendant to specify the valve to be installed, after the contractor had submitted one which did not meet the specifications. This paragraph did not authorize the defendant to specify another valve which, as it knew, also did not meet the specifications.

What the defendant did was to discard the specifications and, on a wholly different basis, viz, its opinion as to which was the best all-around performance valve, require the installation of that valve. If it had written the contract that way in the first place, Loftis would have estimated for that valve, and his estimate would, presumably, have been $55,000 instead of the $41,000 which he did estimate. The defendant's unilateral modification of the contract cost him that much, and the defendant should reimburse him. No problem is present as to the lateness of plaintiff's claim, since Loftis did not even learn the facts on which the claim is based until long after the contract had been completed.

Recovering Boilers

Plaintiff asserts that, although Loftis covered the boilers with the mixture of asbestos and Portland cement called for in the specifications, the defendant required Loftis to remove this covering and replace it with another mixture. Plaintiff sues for the cost of this extra work, which was $905.14.

The specifications for covering the boilers with asbestos are quoted in finding 9. The language in question is in Paragraph 1136 of the specifications, and is as follows: "and last ¼″ shall be one-half Portland cement". Loftis'

workmen took this language to mean one-half by volume, and applied such a mixture. The mixture was too hard, and the coating cracked badly, whereupon the architects required its removal and replacement by a mixture of about one-fourth Portland cement and three-fourths asbestos by volume. If Loftis' workmen had mixed the materials by weight, instead of by volume, the one-half of cement, by weight, would have been about one-fourth, by volume, since the asbestos ingredient was much lighter, and this mixture would have been satisfactory. The defendant contends that Loftis should have known that the mixture by volume would be improper, and hence should have made the mixture by weight. The architects' representative who supervised the work for the defendant testified that specifications for mixtures of cement as ordinarily written mean parts by volume. We think that Loftis' men acted reasonably in reading the specifications as they did, in view of this custom, and had a right to suppose that the defendant wanted the result which the specifications would produce. To be sure, if Loftis' men had known better, they should have inquired as to whether a mistake had been made, just as if the defendant's inspector had happened to observe the mixture, and had known that the result would not be right, he should have given instructions for a proper mixture. In the circumstances, we think the fault was the defendant's in writing the specifications wrongly, and that it should pay for correcting the mistake.

Plaintiff made no claim for this extra work until June 1932, after the work was completed. Plaintiff asserts, and we have found, that there was an understanding between Loftis and the representative of the surety company which took control of Loftis' work while it was still in progress, on the one hand, and Kramer, the representative of the architects, on the other, that Loftis would do whatever was directed by the architects, and would withhold claims for extra work until after the job was completed. On June 20, 1932, plaintiff forwarded to the architects a considerable number of claims, including the one for recovering boilers and others hereinafter discussed. The architects considered these claims on their merits without any assertion that they

were late, and made adverse recommendations on them to the Treasury Department. A hearing was held before the Assistant Secretary of the Treasury in 1933, at which representatives of both parties appeared. Again, no objection on account of lateness was made to the presentation of the claims. On June 5, 1934, the Department rejected the claims. In these circumstances the lateness of presentation of the claims to the architects did not foreclose plaintiff. *Thompson* v. *United States*, 91 C. Cls. 166, 179.

The defendant does not urge that the Department's determination was, under Article 15 of the contract, final. It is not, therefore, necessary for us to determine whether the language of that article is applicable to the questions presented here, or any of them. We have, therefore, decided the several claims on their merits.

Floor and Ceiling Plates

The defendant's architect requested plaintiff to revise its original drawing to show nickel-plated floor and ceiling plates around pipes. The contract did not call for nickel-plated plates. Loftis made the change, and installed the kind of plates requested, without then making any protest or claim for additional compensation. The additional cost of the plates because of the nickel plating was $543.58. The defendant's architect testified that he regarded this change as covered by a change order which related primarily to other fixtures, but the defendant does not urge that contention here. It relies solely on the lateness of plaintiff's claim, which was not made until June 1932, after the completion of the contract. As to the lateness of the claim, what we have said above in relation to the recovering of the boilers is applicable, and plaintiff may recover its additional cost.

Clean-out Plates

Plaintiff claims that it was required to use chromium plated clean-out plates, and that it should be paid the extra cost of the chromium plating, as that was not required by the contract. We have found that this alleged extra cost

was covered by an extra order given and paid for by the defendant, requiring chromium plating on metal in the toilet rooms. Plaintiff is not entitled to recover for this item.

Cleaning Traps

Some traps in the heating system did not operate properly, and the defendant required plaintiff, pursuant to its guaranty, to go over them. In some of them elements were missing and these were installed. All were cleaned. Some months later there was further trouble and the defendant again required plaintiff to clean the traps. Plaintiff urges that the trouble which gave rise to the second cleaning was that the defendant caused the return pipes to be covered, which prevented the steam from condensing, thus interfering with the operation of the traps. The defendant later removed the covering from the return pipes. The basis of plaintiff's claim is that the second cleaning required of it under its guaranty was unnecessary and useless, since it had no relation to the trouble. Article 14 of the specifications, quoted in finding 14, lodged broad discretion in the contracting officer as to determining plaintiff's duty under its guaranty. It concludes with this language:

> The opinion of the contracting officer as to the liability of this contractor under any such guarantee or as to the satisfactory fulfillment or compensation for nonfulfillment thereof shall be final.

The contracting officer concluded, not unreasonably we think, that the second cleaning was called for under the guaranty. We have doubts as to whether he was right, but whichever way we might resolve our doubts, plaintiff could not recover, in view of the language quoted.

Vent Pipes for Dishwashing Machine

The contract called for the installation of a dishwashing machine. It is not good practice to connect the vents for exhaust steam from such a machine with the ventilating system of a kitchen, hence such a connection was not called for by the contract, which contained no language specific

to the problem. Loftis, however, furnished the architects a shop drawing showing the machine connected with the ventilating system. Loftis was in error in so making the shop drawing and, when he installed the machine, he did not make the connection, and objected to being required to do so. He was, however, directed in writing to make the connection, which he did at a cost of $103.00. The arrangement did not work, and the connection was later removed. Plaintiff made a written claim for this item, which was rejected by the architects. He again included this claim in the group presented in June 1932, and it was dealt with in the way we have described above in connection with the claim for recovering the boilers. Plaintiff may recover on this item.

Vent Pipes for Steam Kettles

Practically the same things happened concerning the steam kettles as we have described in connection with the dishwashing machine, except that here Loftis made no shop drawing showing connections with the ventilating system. He was, however, ordered to make the connection, which he did at a cost of $475.00 and, the arrangement proving unworkable, the defendant later removed the connection. There was a claim, a rejection, and a renewal of the claim as in the case of the dishwashing machine. Plaintiff may recover.

We have, as appears above, concluded that plaintiff may recover on its claims for radiator valves, recovering boilers, floor and ceiling plates, and connecting the dishwashing machine and steam kettles with the ventilating system. The several amounts, with allowances for overhead and profit, where proper, total $16,452.33, and for this amount plaintiff is entitled to a judgment. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

Syllabus

ASPHALT REVETMENT CO., INC. v. THE UNITED STATES

[No. 43300. Decided February 1, 1943]

On the Proofs

Patent for protective mat structure for river banks; validity.—United States letters patent 1,874,567, applied for August 8, 1929, and issued August 30, 1932, to Oscar A. Mechlin, directed to a protective mat structure for river banks, and assigned January 19, 1931, to plaintiff, *held* to be invalid.

Same; infringement.—For many years United States engineers engaged in revetment work to protect the banks of the Mississippi River and to stabilize the river in its course have used various types of protective mattresses such as fascine and articulated concrete, and the Government has also manufactured and installed reinforced asphaltic composition mattresses. The terminology of the two claims of the patent in suit is applicable to this latter type of structure and the Mechlin patent if valid would be infringed thereby.

Same; validity.—When the claims of a patent are directed to an asphaltic composition possessing certain characteristics, such as flexibility and self-sustaining cohesiveness, and the proper proportions of asphaltic compositions having the same characteristics were well known in the prior art, it is not necessary for the specification to disclose in detail the proportions of the various ingredients mentioned as forming the composition, and the claims are not invalid because of the lack of such disclosure.

Same; anticipation.—The two claims of the Mechlin patent in suit do not specify anything previously unknown to those skilled in the art and are not directed to novel subject matter.

Same.—The two claims of the patent in suit are anticipated by the United States patent 869,566 issued to Hawkes in 1907.

Same; indefiniteness.—The specifications of the Mechlin patent disclose no limitation as to length, width or thickness of the mat of asphaltic composition; and plaintiff's theory that the patent monopoly is addressed only to large continuous sheets and not to mats of the size set forth in the prior art patent to McGillivray would, if followed, lead to invalidation of the claims because of failure to properly define the invention. *General Electric Co.* v. *Wabash Appliance Corporation, et al.*, 304 U. S. 364, 369, cited.

The Reporter's statement of the case:

Messrs. George R. Shields and *Gilbert P. Ritter* for the plaintiff. *King & King* were on the briefs.

Mr. H. L. Godfrey, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

The court made special findings of fact as follows:

1. This is a patent suit alleging infringement of United States letters patent 1,874,567 to Oscar A. Mechlin on an application filed August 8, 1929, and issued August 30, 1932. The patent is directed to a protective mat structure for river banks. A copy of the patent in suit, plaintiff's Exhibit 1, and a copy of the file wrapper and contents of the application which materialized into the patent in suit, defendant's Exhibit 3, are made a part of this finding by reference.

2. The plaintiff in this case, Asphalt Revetment Co., Inc., is a corporation organized under the laws of the State of Delaware, having offices located in Washington, D. C.

The patent in suit was assigned to the plaintiff corporation by an assignment executed January 19, 1931, a certified copy of this assignment, plaintiff's Exhibit 2, being made a part of this finding by reference. The patent in suit at the time of execution of this instrument was in the form of an application pending before the Patent Office.

3. In December 1933, and in January 1934, the plaintiff, through an employee of Mr. Ernest F. Mechlin, at conferences with Colonel Edgerton, of the U. S. Army, who had charge of rivers and harbors work, and General Markham, Chief of Engineers of the U. S. Army, and other Army officials, gave oral notice of the existence of the patent now in suit.

4. In connection with rivers, and more particularly in connection with the Mississippi River, various methods of subaqueous bank protection have been utilized by the United States Army engineers to protect the banks of the river against attack and washing away by the current. Such construction is important in that it tends to prevent cutting of new channels and tends to stabilize the river in its course.

One of the desirable characteristics necessary for revet-

ment or mattress construction is flexibility. This permits the mattress when placed in position to conform with the undulations of the subaqueous river bank, and also, if undercutting of the bank subsequently occurs, a mattress is capable of more or less adjusting itself to the newly-formed contour.

This characteristic of flexibility is exemplified by two forms of revetment construction which have been used on the Mississippi River, known respectively as the fascine mat and the articulated concrete mat.

The fascine mat is formed of bundles of willow brush tightly woven together by noncorrosive wire or cable, the ordinary size of a fascine mattress being about a foot thick, 300 feet wide and 1,000 feet long. Such a mattress is floated into position, held there by lines, and is sunk to its final location on the river bed by loading it with rock.

The articulated concrete mat is formed by a plurality of closely spaced reinforced concrete blocks, the reinforcing or metallic parts of the mattress generally being made of noncorrosive metal and extending through from one block to the adjacent block, thus providing an articulated joint. Such a mattress is located on a barge and is then continuously fed over the side of the barge which moves out transversely from the river bank until a sufficient length has been sunk. The joints formed between the individual concrete blocks provide the flexibility necessary for the mattress as a whole to conform to the undulations of the river bank.

Both the fascine mat and the articulated concrete mat are standardized forms of construction and both types have been installed as revetments on the Mississippi River by the defendant as late as 1939.

THE PATENT IN SUIT

5. The patent in suit is directed to a flexible, protective mat for the protection of river banks.

The specification describes the construction of this mat as embodying a foraminous metal sheet, such as expanded metal or wire screening embedded and enclosed in a flexible self-sustaining sheet of material. With respect to the elements of which the mat is constructed, the specification states:

> It is preferable for the inert body of the mat to use sand and gravel, or broken stone and stone dust, and for the cohesive binder, a suitable bituminous mastic material such as oil asphalt. The binder and the inert body are mixed in proper portions to provide a flexible, plastic mass which when enclosed around the inside metallic reinforcement, forms a self-sustaining sheet or mat that may be directly applied to the river bank or other site to be protected. Although substantially water tight, the mat is flexible throughout its mass and when applied conforms itself to the contour of the river bank.

The element in the above-quoted portion that contributes to the flexibility of the mat is the binder of bituminous mastic material. This is referred to in the subsequent claims as "a waterproof plastic binder" or "an oil asphalt binder."

The specification does not mention any specific proportions of the various materials specified but merely indicates that they should be mixed in the *proper proportions*, and therefore leaves it to the prior knowledge of those skilled in the art to make a mixture having the desired characteristics of flexibility and self-sustaining cohesiveness.

The specification then continues as to a suggested method of forming the protective mat on a barge and feeding the mat over the side of the barge in order to sink the same. The specification does not contain any instructions as to the size or thickness of the mats, this also being left to those skilled in the art. It does, however, contain the following statement:

> If desired, instead of forming the mats as a continuous sheet, they may be made of individual sheets of the required dimensions.

This statement is indicative of the fact that the invention contemplates either a mat as a continuous sheet or made up of a plurality of individual sheets of dimensions which may be selected as required by those skilled in the art.

6. The patent has two claims, both of which are directed to an article of manufacture. Both of these claims are in issue and are quoted below:

> 1. A protective mat for river banks consisting of a metallic reinforcement embedded in a mass of inert

> filler material so permeated with a waterproof plastic binder of such coherence and viscosity as to form a permanently flexible homogeneous water-resistant self-sustaining uncovered sheet, the surface of which directly contacts with the river site and the mass of which conforms of itself to the contour thereof.
>
> 2. A protective mat for river banks consisting of a metallic reinforcement embedded in a mass of inert filler material so permeated with an oil asphalt binder of such coherence and viscosity as to form a permanently flexible homogeneous water-resistant self-sustaining uncovered sheet, the surface of which directly contacts with the river site and the mass of which conforms of itself to the contour thereof.

7. There is no satisfactory evidence of conception or reduction to practice of the inventions set forth in the claims in suit earlier than August 8, 1929, the filing date of the Mechlin application which materialized into the patent in suit.

8. The Mechlin application during its prosecution before the Patent Office contained claims directed to an article of manufacture and the method of laying the article. Upon rejection of the method claims by the Patent Office these claims were canceled.

The article claims (claims 1 and 2 now in suit) were finally rejected on U. S. Patents to Condie 983,209; McGillivray 1,112,018, and Garrison 407,195. The rejection was appealed to the Board of Appeals of the Patent Office and the board reversed the Primary Examiner, and the patent was then issued with the claims now in suit.

9. The term "asphalt" has a dual meaning to those skilled in the art and may mean either a solid bituminous substance or a composition of the bituminous substance with inert materials. The following definition is from Webster's International Dictionary of the English Language, published by Merriam in 1928:

> Asphalt. 1. Min. A brown to black, solid bituminous substance occurring native at the Dead Sea, in Trinidad, and elsewhere (natural or native asphalt), and also obtained as a residue from petroleum, coal tar, lignite tar, etc. (artificial asphalt); mineral pitch. * * *
>
> 2. A composition of ground asphalt rock and bitumen, of bitumen, lime, and gravel, or even of coal tar, lime,

sand, etc., used for forming pavements, and as a waterproof cement for bridges, roofs, etc.; asphaltic cement.

In the British Standard Specifications for Mastic Asphalt Surfacing published under the British Engineering Standards Association, December 1928, the following occurs.

> *Asphalt.*—Natural or mechanical mixtures in which the asphaltic bitumen is associated with inert mineral matter.

THE ALLEGED INFRINGING STRUCTURE

10. Subsequent to the date of issuance of the patent in suit (August 30, 1932) and prior to the date of the filing of the petition in this case (April 16, 1936) the defendant has manufactured and installed on the banks of the Mississippi River, and more particularly in the New Orleans District, subaqueous revetment mats of asphaltic composition. These mats were fabricated on the deck of a mattress barge, which at the beginning of a revetment operation was moored adjacent the shore at the head or upstream section of the river bank to be protected. The mattresses were about 1½ to 2 inches thick and varied from approximately 160 to 217 feet in width. They were of various lengths.

In constructing a mattress, reinforcing wire mesh and launching and anchor cables spaced at desired intervals were first fastened together into a continuous reinforcing member, this being supported about 1 inch above the deck of the barge on wire supports. The launching and anchor cables were located at right angles to each other and were so spaced as to take and equalize to a maximum extent the strains occurring during the subsequent launching operation.

A heated mixture of oil asphalt, loess, and sand was then spread over the reinforcing members and tamped or rolled to compact the mixture about the reinforcements, embedding the latter substantially midway between the upper and lower surfaces of the mattress. The loess, which was used as a filler in the mixture, is a wind-blown, loam-like material common to the bluffs along the lower Mississippi River. When pulverized it becomes a very fine inert powder similar to stone dust. The preferred proportions of the asphaltic mixture selected by the United States engineers after experi-

mentation were 11 to 12 percent asphalt and 22 to 26 percent loess, the remainder being sand. The mixture was known as "76-mix."

Physical exhibits, defendant's Exhibits 6 and 7, are small sections of 1½″ mat typifying the form of construction as described. Defendant's Exhibit 6 is a section of the mat containing the reinforcing wires, and defendant's Exhibit 7 is a section of the mat containing, in addition to the reinforcing wires, the launching and anchor cables.

11. When a 30-foot section of the mat was constructed on the deck of the barge, as described in the previous finding, its end was fixed by anchor cables to the river bank. The mattress was then launched over the end of the barge, the mattress moving along the deck thereof until only a small portion remained on the barge. A second 30-foot section joining with the first was then fabricated in the same manner. This in turn was launched and these operations were repeated until a continuous mattress of the desired length had been constructed and lowered to the river bed, the successive portions of the mattress being launched by moving the barge away from the bank toward the center of the river.

After the first mattress had been completed and laid, the barge was then moved downstream and construction of a second width of mattress started, the sequence of operations being repeated until the necessary number of widths had been placed in position.

12. The protective mat thus constructed and launched consisted of a metallic reinforcement member embedded in a mass of asphaltic composition comprising inert filler material permeated or mixed with a waterproof plastic binder comprising oil asphalt, the composition being of such coherence and viscosity as to form a permanently flexible continuous water-resistant and self-sustaining sheet, the surface of which when lowered to the river bed directly contacted the same and the mass of which was capable of conforming itself to the contour of the river bed without the necessity of any covering of stone or other weighting material.

13. The terminology of both claims of the patent in suit is applicable to the asphaltic composition mattress manufac-

tured and installed by the defendant as described in the previous findings.

PRIOR ART AND KNOWLEDGE

14. The following patents and publications were available to those skilled in the art more than two years prior to the filing date (August 8, 1929) of the Mechlin application which materialized into the patent in suit:

Patents

Country	Patentee	Number	Date	Deft.'s Ex.
United States	Shearer	1, 229, 152	June 5, 1917	4-AA.
" "	McGillivray	1, 112, 018	Sept. 29, 1914	4-E.
" "	Condie	983, 209	Jan. 31, 1911	4-F.
" "	Garrison	407, 195	July 16, 1889	4-G.
" "	Greene	1, 579, 443	Apr. 6, 1926	4-I.
" "	Hawkes	869, 566	Oct. 29, 1907	4-K.
Great Britain	Field	15, 277	1904 (accepted)	4-L.
United States	Wiederhold	1, 261, 662	Apr. 2, 1918	4-M.
Great Britain	Lucka	22, 682	1913 (accepted 1914)	4-Y.
United States	Chenoweth	1, 359, 575	Nov. 23, 1920	4-Z.

PRINTED PUBLICATIONS

Annual Report of Mississippi River Commission for 1919, page 3735, and plate No. 1 (Deft.'s Ex. 1);
Municipal and County Engineering of October 1923, pages 169–172 (Deft.'s Ex. 4–A);
Standard Oil Bulletin of January 1923, pages 14 and 15 (Deft.'s Ex. 4–B);
Standard Oil Bulletin of December 1923, pages 5 and 6 (Deft.'s Ex. 4–C);
The Roadrunner, February 10, 1922 (Deft.'s Ex. 4–D);
The Modern Asphalt Pavement, published 1908, page 348 (Deft.'s Ex. 4–H);
Standard Oil Bulletin of May 1924, pages 8–13, with photographs (Deft.'s Ex. 4–J);
Johns-Manville Drawing No. M–3, Copyright 1921 (Deft.'s Ex. 4–N);
Engineering News-Record of October 28, 1926, page 25 (Deft.'s Ex. 4–Q);
Fourth Biennial Report of the California Highway Commission, published November 1, 1924, pages 62 and 63 (Deft.'s Ex. 4–S);
British Engineering Standards Association Bulletin No. 76, published April 1916, page 9 (Deft.'s Ex. 4–W);
British Engineering Standards Association Bulletin No. 346, published December 1928, page 6 (Deft.'s Ex. 4–X);

Copies of the above enumerated patents and publications are made a part of this finding by reference.

With the exception of the following patents, none of the foregoing prior art was cited by the examiner during the prosecution in the Patent Office of the Mechlin application:

McGillivray	No. 1,112,018
Condie	No. 983,209
Garrison	No. 407,195
Shearer	No. 1,229,152

15. In addition to the prior art patents and publications listed in Finding 14, United States patent to Dunker No. 1,737,412 was issued November 26, 1929, on an application filed in the U. S. Patent Office under date of May 27, 1926.

A copy of this patent (defendant's Exhibit 4–V) is made a part of this finding by reference.

16. For many years prior to the Mechlin filing date it had been well known to those skilled in the art pertaining to asphaltic compositions that permanent flexibility and self-sustaining cohesiveness were inherent characteristics of asphaltic compositions. In the Standard Oil Bulletin published in December 1923 (defendant's Exhibit 4–C) it is stated:

> That characteristic of asphalt which makes it so efficacious as a binder is its ductility, otherwise its pliancy, flexibility, or elasticity. It is this quality that makes asphalt pavement superior to pavements in which asphalt is not a factor. * * * Asphalts of various grades, consistencies, and characteristics are now manufactured direct from properly selected asphalt-petroleum oils to suit a wide variety of conditions, which include road-building, *ditch-lining*, construction of roofs, the treatment of wooden, metal, and cement pipes and flumes, for the protection of iron and steel work, grouting wood, block, and vitrified brick pavements. All of these uses bring into play its invaluable quality, ductility, and binding value. [Italics ours.]

17. The recognition of flexibility as a characteristic of asphaltic composition as used in road building, and the resulting ability to follow the changing contour of the subgrade in road construction, are set forth in the publication "The Roadrunner" for February 10, 1922 (defendant's Exhibit 4–D). On page 6 thereof the following statement appears with respect to flexibility:

> The flexibility of an asphaltic concrete pavement allows it to follow the subgrade, and, where there are depressions caused by fills or upheavals caused by the freezing of the subgrade, this type of pavement is capable of withstanding the changes without cracking or other subsequent damage.

18. The Standard Oil Bulletin for May 1924, pages 8–13, discloses the use of a flexible asphaltic composition lining for irrigation canals. One function of such a lining is expressed in this article as follows:

> A lined canal may be given a much steeper slope than an unlined one without danger of scouring and washing away the bed of the canal.

The composition suggested for the flexible asphaltic lining is as follows:

"D" Grade Calol Asphalt	13%–15%
Mineral filler, such as rockdust	10%–15%
Sand	70%–77%

The "D" grade Calol asphalt is an ordinary paving grade of oil asphalt manufactured by the Standard Oil Company of California. As described in this article, this mixture is heated and transported to the section of the canal to be lined, where it is there spread to the desired depth and rolled or tamped in place on the bottom and side slopes of the canal. With respect to the proper thickness, the article states:

> A thickness of one to one and a half inches is considered sufficient for asphaltic linings, due to their flexibility, and this feature of course effects another material saving.

The article further indicates that the flexible asphaltic material conforms, without cracking, to any depressions or settlings which may occur in the subgrade after the construction of the lining.

The canal or waterway lining described in this article is substantially similar to that fabricated by the defendant on the Mississippi River with respect to its function as a continuous "permanently flexible and homogeneous water-resistant, self-sustaining uncovered sheet," with the excep-

tion that it is fabricated in its final location and has no metallic reinforcement embedded in it, instead of being fabricated on a metallic reinforcement and subsequently lowered to the bottom bank of the waterway.

19. U. S. patent to McGillivray (defendant's Exhibit 4–E) is for a construction relating to the protection of levees and embankments from erosion or wear or injury by the action of the water. The invention contemplates the formation of a revetment from a plurality of slabs or blocks of suitable composition or material. The specification refers to the size of the slabs as being from 2 to 6 inches in thickness, from 1 to 3 feet in width, and from 2 to 10 feet in length. These slabs are provided with cables or other fastenings and as they are placed in position each slab is fastened to the adjoining slab. The specification also suggests that a large number of slabs can be assembled on barges or boats, tied to the cables and fastened together, and then lowered to the point to which it is desired to lower them beneath the surface of the water.

The specification, after suggesting that these slabs be composed of concrete, states:

> These slabs may also be made of clay or clay products; they may be made of asphalt; they may be made of asphalt macadam, which is a mixture or combination of asphalt and gravel or crushed rock; they may be made of crude oil and crushed rock reinforced with iron or steel; they may be made of concrete and steel (or other metal) or asphalt and steel or other metal (the steel or other metal being used as a reinforcement or protection to the asphalt, concrete, and crude oil and crushed rock * * *).

With respect to the use of reinforcement the patent states—

> The slabs may be reinforced by means of iron, steel or other metal reinforcement. This reinforcement is arranged in such a manner that the strain from the attachment of the slabs to the cable and the slabs to each other will come on the metal reinforcement and not on the concrete asphaltum or other material used in the construction of the slab or unit.

This disclosure suggests to those skilled in the art the use of individual reinforced, self-sustaining slabs or sheets of

asphaltic composition and of the dimensions specified, with each sheet possessing all the inherent characteristics of asphaltic mixtures and compounds.

In this respect this disclosure is substantially similar to the modified form of the construction suggested in lines 64 to 67 of the patent in suit, in which it is stated—

> If desired, instead of forming the mats as a continuous sheet, they may be made of individual sheets of the required dimensions.

20. U. S. patent to Hawkes issued in 1907 (defendant's Exhibit 4-K) is substantially similar to the disclosure set forth in the previous finding.

The Hawkes patent, which is directed to riprap, is stated to relate to the control or restraint of water courses of every description, the object of the invention being set forth "to provide a flexible, resistant covering for the protection of such exposed places * * *." The first form disclosed in the specifications and drawings comprises a series of blocks of material having metal rods, bands, sheets, or cables passing through the block, both longitudinally and laterally, for the purpose of strengthening the block and also for attaching a plurality of blocks together. The specification suggests as the material for forming the blocks, "concrete, asphaltum, artificial stone, cement, rubber, or other material or composition adapted to resist the action of water."

In this first form one of the objects of the spaces between the blocks is to insure flexibility of the apron.

The specification then suggests as an alternative form of construction a continuous flexible sheet, the phraseology of this portion of the disclosure being as follows:

> Where it is desired to supply flexible riprap of a character practically impervious to water, then as an alternate to the block system above described, a tensile mesh may be provided and incorporated into a continuous flexible sheet formed of any water-resisting material capable of yielding to pressure without being readily ruptured.

In following the disclosure of this patent it would be within the knowledge of those skilled in the art to utilize asphaltum for constructing the continuous flexible rein-

forced sheet, this being one of the materials suggested in this specification.

21. British patent to Field, accepted in 1904 (defendant's Exhibit 4–L), relates to the subject matter in suit. The preliminary statement of the invention set forth in this patent is as follows:

> My invention consists in spreading mastic asphalt or other equivalent suitable bituminous substance over wire, woven cloth, gauze, or wire woven paper, for use in forming roofs, damp courses, lining the walls and floors of reservoirs, railway and other bridges, and for similar purposes for which asphalt is generally employed.

With respect to the meaning of the term "mastic asphalt" as given in the above-quoted subject matter, see the definition given in Finding 9 with respect to the British Standards Specifications for mastic asphalt surfacing.

As regards the method of fabricating the waterproof flexible sheets the specification further states—

> In carrying out my improvements, I melt the asphalt or bituminous material, in a copper cauldron, or like vessel until it becomes sufficiently fluid or plastic for my purpose. The wire, net, gauze, woven cloth paper in which wire is interwoven or equivalent base is stretched upon a slab, table, boards, or the like and the asphalt is then poured over the same and spread with a trowel, float, or like implement; or in making roofs, lining reservoirs or other large surfaces I may stretch, and if necessary secure by staples or other suitable means, the wire, netting, gauze, or the like base to such surfaces and spread the melted asphalt over the same, a trowel or float being employed for this purpose. When the wire, netting, or other equivalent, is coated and dried, it may be rolled up, and any desired length cut from the same, or it may be formed in slabs of any desired size.

Fig. 3 of the patent shows wire or wire net coated on both sides with the mastic asphalt composition.

22. British patent to Lucka, accepted in 1914 (defendant's Exhibit 4–Y), relates to a breach mat for closing leaks in ships. The specification states that—

> The breach mat consists essentially of a layer of asphalt which is covered with one or more layers of wire

netting or trellis work pressed into it or which has one or more layers of wire netting or trellis work embedded in it.

In this patent Fig. 5 discloses the reinforcing wire netting as embedded in a layer of asphalt or similar material.

23. More than two years prior to the date of filing of the application which materialized into the patent in suit the inherent characteristics of asphaltic compositions, such as permanent flexibility, self-sustaining cohesiveness, and water-resistant properties, were known to those skilled in the art. The use of asphaltic composition in both slabs and continuous sheets, both with and without metallic wire reinforcement, and for the purpose of the control or restraint of water courses, was also known to those skilled in the art.

The use of pre-formed reinforced, flexible sheets of asphaltic composition was also known.

The phraseology of the two claims of the Mechlin patent in suit does not specify anything previously unknown to those skilled in the art, and these claims are not directed to novel subject-matter and are invalid.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff in this case seeks to recover for the alleged infringement of a patent granted on application of Oscar A. Mechlin for improvements in "protection of river banks," the plaintiff corporation having acquired title to this patent by an assignment executed January 19, 1931. The patent is directed to a reinforced protective mat of asphaltic composition having permanently flexible characteristics. The terminology of the two claims of the patent in suit is applicable to asphaltic composition mattresses manufactured and installed by the defendant on the banks of the Mississippi River, and the patent, if valid, is infringed by this structure. The issue thus presented to us is one of validity.

The defendant contends that the patent in suit is invalid for lack of sufficient disclosure and also that the patent fails to disclose any feature of novelty in view of the teachings of the prior art.

The essential facts established by the record are set forth in the findings. Plaintiff took exception to many of the Commissioner's findings and has proposed certain changes in them. The defendant urges that the Commissioner's findings be adopted and the amendments suggested by plaintiff be denied.

Upon consideration of plaintiff's exceptions to the findings, in the light of the entire record in this case and the specifications and claims of the patent in suit, we are of the opinion that they are not sustained by the record. Other than our consideration of prior art and knowledge which follows, and which we think answers plaintiff's exceptions on this phase of the case, no useful purpose would be served by a detailed discussion of plaintiff's numerous exceptions.

It has long been common knowledge that the bank of a river or stream or a canal, which may be properly termed an artificial stream, is subjected to the erosive effects of the flowing water. This is particularly true where the bank is on a bend of a river or stream and thus receives a direct impingement of the water.

For many years defendant's engineers have been actively engaged in revetment work in order to protect the banks of the Mississippi River and to stabilize it in its course. Various types of mats or mattresses have been used for this purpose, the most prominent of which are the fascine mattress and the articulated concrete mattress.

The fascine mattress comprises bundles of willow brush woven together by wire or cable, floated into position and sunk to its final location by loading it with rock. The articulated concrete mattress comprises a plurality of closely spaced, reinforced concrete blocks, the reinforcing parts of the mattress extending from one block to the next and thus making an articulated joint. Both of these types of bank-protective mats possess the inherent flexibility necessary for the mattress to conform to the unevenness of the bank and if a portion of the bank is eroded underneath the mats they will, because of their flexibility, tend to conform to the new contour.

The patent in suit has two claims, both of which are in issue. In our discussion it is only necessary to consider claim 1, which is as follows:

1. A protective mat for river banks consisting of a metallic reinforcement embedded in a mass of inert filler material so permeated with a waterproof plastic binder of such coherence and viscosity as to form a permanently flexible homogeneous water-resistant self-sustaining uncovered sheet, the surface of which directly contacts with the river site and the mass of which conforms of itself to the contour thereof.

The phraseology of the second claim is identical to this with the exception that it defines the binder as an "*oil asphalt binder*" instead of a "*waterproof plastic binder.*"

It is manifest from the patent specifications that the inventor was attempting to create a form of metal reinforced mat structure of asphaltic composition having the same characteristic or flexibility and ability of conformation as exemplified by the willow mat structure and the articulated concrete structure, making use of the flexibility which is a known characteristic of asphaltic and mastic compounds.

The articulated concrete mat and the method of laying it were disclosed to those skilled in the art many years before the filing of the Mechlin application which matured into the patent in suit, in a United States patent to Shearer 1,-229,152 issued June 5, 1917. *Shearer* v. *United States*, 87 C. Cls. 40. From the arguments presented in plaintiff's brief it might indeed be readily assumed that the issue of validity now before us is mainly dependent upon whether the reinforced asphaltic composition mat was a sufficient advance step in the art as compared with the reinforced articulated concrete mat to come within the realms of invention. Our consideration of the prior art, however, which follows indicates that this is a question that we do not have to answer, for reinforced asphaltic composition mats for river bank protection form a part of the prior art, and the use of reinforced asphaltic composition for this purpose was not a novel mental concept of the patentee Mechlin.

The Mechlin application as filed on August 8, 1929, contained ten claims, these claims being addressed respectively to a method of protecting river banks; a method of forming flexible protective mats for this purpose, and to the structural elements of the mat itself (see Finding 8 and defend-

ant's Exhibit 3). Upon rejection of the Mechlin method claims by the Patent Office these claims were canceled and the patent as issued contained the two claims in suit, which are directed to structure only and must be considered irrespective of any particular method of formulating or laying such structure. Incidentally, the abandonment of the method claims took place after citation of the Shearer patent by the Patent Office examiner.

As has already been indicated, one of the grounds urged by the defendant as to why the patent should be considered invalid is that of alleged failure of the specification to give a sufficient disclosure for the purpose of enabling one skilled in the art to practice the invention.

Section 4888 of the Revised Statutes provides that the inventor of an invention

> * * * shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; * * * (16 Stat. 201)

The specification of the patent in suit gives the following instructions to those skilled in the art with reference to the composition and structure of the same:

> There is provided a metallic reinforcement consisting preferably of a foraminous metal sheet, such as expanded metal or wire screening, of the desired width and length. The metallic reinforcement is embedded in a flexible self-sustaining mat, composed of inert granular material and a binder which is caused to permeate the mass of inert material so as to provide a coherent mass which substantially encloses the metallic reinforcement. It is preferable for the inert body of the mat to use sand and gravel, or broken stone and stone dust, and for the cohesive binder, a suitable bituminous mastic material such as oil asphalt. *The binder and the inert body are mixed in proper portions* to provide a flexible, plastic mass which when enclosed around the inside metallic reinforcement, forms a self-sustaining sheet or mat that may be directly applied to the river bank or other site to be protected. [Italics ours.]

More specifically, defendant's position is that the above quotation from the patent specifications is merely an invitation to experiment until the proper proportions of asphaltic binder, sand, and gravel, or broken stone and stone dust, are obtained, and that a failure to give more definite information as to the proper proportions of the various materials to be used is a noncompliance with the above-quoted portion of the patent statutes. To this we do not agree. The state of the prior art as shown by the record in this case would indicate that those skilled in this particular art possess ample knowledge of the proper proportions of such a mixture.

The Standard Oil Bulletin of May 1924 (Finding 18) made public five years before the application date of the patent in suit, enters into a complete discussion of asphaltic canal lining and on page 12 describes a canal lining of a thickness of 1½″, speaks of its inherent flexibility, and states that the flexible asphaltic material conforms without cracking to any depressions or settlings which may occur after the construction of the lining. The article specifies that the asphalt mix to be used is as follows:

"D" Grade Calol Asphalt	13%–15%
Mineral filler, such as rockdust	10%–15%
Sand	70%–77%

As a matter of fact, this publication which we merely refer to as showing the prior state of the art and knowledge of the flexible qualities of asphalt, appears to disclose everything called for by the claims of the patent in suit with the exception of the metallic reinforcing, which, from the record, is old and well known to those skilled both in the concrete and asphaltic composition art.

It may well be that in different localities stone, crushed stone, and stone dust may have different characteristics, and, just as in the case of cement mixtures, require some alteration in the percentages of these inert materials combined with the asphalt, but we do not think such adjustment to local conditions is outside the mental scope of the ordinary man skilled in the art, or requires such a degree of experimentation as brings this case within the principle announced by the Supreme Court in *Steward* v. *American Lava Co.*, 215 U. S. 161.

In our consideration of the Mechlin patent the next question which presents itself is with respect to the size and dimensions of the asphaltic composition mats specified by the claims in suit. The mats installed by the Government in the Mississippi River and upon which the present charge of infringement is based, were about 1½ to 2 inches thick, varied from approximately 160 to 217 feet in width, and were of various lengths. Plaintiff, of course, urges that mats of this size come within the terminology of the claims. The defendant raises no issue as to this and we have so found.

Would a mat, however, of asphaltic composition, with its inherent quality of flexibility, reinforced by a metal reinforcement, and from 2 to 6 inches in thickness, 1 to 3 feet in width, and from 2 to 10 feet in length also come within the terminology of the claims? Plaintiff is placed in the rather peculiar position of urging that it does not because mats of reinforced asphaltic composition of the dimensions which we have just stated are disclosed in the prior art United States patent to McGillivray (see Finding 19). A careful examination of the specification of the Mechlin patent discloses no limitation as to length, width or thickness, and in fact this is apparently left entirely to those skilled in the art, for the specification of the patent in suit states—

> If desired, instead of forming the mats as a continuous sheet, they may be made of individual sheets of the *required dimensions*. [Italics supplied.]

Plaintiff attempts to argue that this statement in the specification deals only with the act of making or "forming" small sheets which are subsequently joined into a large continuous sheet. We feel certain, however, that the Mechlin patent clearly was intended to include in its scope mats of any suitable dimensions, be they large or small.

Plaintiff's theory that the patent monopoly is addressed to large continuous sheets only and not to mats of the size set forth in the prior art patent to McGillivray, if followed, would lead to invalidation of the claims because of indefiniteness. See *General Electric Co.* v. *Wabash Appliance Corporation, et al.*, 304 U. S. 364, 369, which states:

> Patents, whether basic or for improvements, must comply accurately and precisely with the statutory re-

quirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertaintly as to their rights. *The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not."* [Italics supplied.]

It is only necessary to refer to one other prior art patent, the United States patent to Hawkes. The disclosures and teachings of this patent are covered in Finding 20, but what is shown and described in this prior patent is so remarkably similar to what the Mechlin patent in suit attempts to establish as a patent monopoly that we feel, even at the expense of some repetition, we should again refer to it in some detail.

The Hawkes patent is directed to the same subject matter as the patent in suit. Hawkes states in his specification that—

> My invention relates to improvements in ripraps, for the control or restraint, within fixed bounds, of water courses of every description, * * * the object of the invention being to provide a flexible, resistant covering, for the protection of such exposed places as may be subject to damage through water, also to provide an efficient apron of water-resisting materials, for the purpose of diverting currents of water into suitable channels, * * *.

In his disclosure of materials to be used, one of the materials suggested is asphaltum. In the first form in which this is disclosed the specification refers to it as blocks, stating that—

> This block may be of any desired shape, size, and thickness.

This statement is substantially identical with the instructions given in the patent in suit, which we have already quoted and which refers to the mats being made of individual sheets of the *required dimensions.*

The suggestion is also made that these blocks may be reinforced by metal rods, bands, plates, chains, cables or fiber strands, which are passed through the block both longitudinally and laterally, the Hawkes specification thus disclosing a block of metallically reinforced asphaltic composition of any desired shape or size or thickness.

After discussing various methods of using the blocks and fastening them together in a manner somewhat similar to the articulated concrete blocks, Hawkes states further—

> Where it is desired to supply flexible riprap of a character practically impervious to water, then as an alternate to the block system above described, a tensile mesh may be provided and incorporated into a continuous flexible sheet formed of any water-resisting material capable of yielding to pressure without being readily ruptured.

There is no doubt in our minds that the form here suggested, coupled with Hawkes' suggestion of the use of asphaltum with its well-known inherently flexible properties, is exactly what the defendant has utilized on the banks of the Mississippi River.

The Hawkes patent was published October 29, 1907, and following the old axiom, that which infringes if early enough anticipates, the two claims in suit are anticipated. The prior art which we have specifically referred to in this opinion, as well as that set forth in the findings of fact, clearly shows that the inherent characteristics of asphaltic compositions, such as permanent flexibility, water-resistant properties, and self-sustaining cohesiveness, were known to those skilled in the art, and the use of asphaltic compositions in both slabs and continuous sheets with metallic reinforcement, and for the purpose of the control of water courses, was also known.

The two claims of the Mechlin patent in suit do not specify anything previously unknown to those skilled in the art and these claims are not directed to novel subject matter, and are invalid.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

J. L. YOUNG ENGINEERING CO., LTD., v. THE UNITED STATES

[No. 43395. Decided February 1, 1943]

On the Proofs

Government contract; delay by Government's failure to furnish drawings and models as agreed.—Where plaintiff, a Hawaiian corporation engaged in the construction business, entered into a contract with the Government November 30, 1932, to furnish all labor and materials, and to perform all work required for the demolition and removal of existing structures and for the construction of certain buildings, with specified equipment, for the United States Immigration station at Honolulu; and where the specifications prepared by defendant and under which plaintiff submitted its bid provided that the work should be completed within 480 calendar days from the date of receipt of notice to proceed; and where such notice to proceed was received by plaintiff January 5, 1933, which accordingly fixed May 1, 1934, as the completion date; and where the buildings were substantially completed by May 19, 1934, and occupied by defendant's representatives, and by July 10, 1934, the entire job, including demolition and removal of old buildings, was completed in accordance with the plans and specifications; it is *held* that plaintiff was delayed 90 days by the defendant's failure to furnish drawings and models, and plaintiff is accordingly entitled to recover.

Same; breach of contract.—Where the Government agreed to furnish certain detail drawings and certain models for the manufacture of ornamental terra cotta specified to be used by plaintiff in the construction of certain of the buildings and where the drawings were not supplied to the terra cotta manufacturer until August 16, 1933, though plaintiff's contract had been awarded on November 30, 1932, and notice to proceed had been given to plaintiff on January 5, 1933; it is *held* that such failure to furnish models and drawings extended far beyond the time contemplated by the parties when the contract was made and constituted a breach of contract by the defendant.

Same; contractor's right to complete work earlier than agreed date.—Where it is established by the evidence that if plaintiff's work had not been delayed by defendant's breach of contract the work would have been completed sometime before the agreed date; and where the work was actually completed 70 days after such agreed date; it is *held* that the contract contained no promise that plaintiff would not complete the work before such agreed date and gave the defendant no right unreasonably to prevent earlier completion. *Blair* v. *United States*, No. 43548, decided October 5, 1942, cited. (99 Cl. Cls. —.)

Same; unreasonable delay; extension agreed upon to avoid liquidated damages.—Where the plaintiff requested and the defendant granted only a 60-day extension beyond the agreed date for plaintiff to complete Government contract; and where the plaintiff and the Government representative with whom said 60-day extension was negotiated both understood that the purpose of such extension was to relieve plaintiff of the assessment of liquidated damages for completion later than the time fixed in the contract; it is *held* that such agreement does not prove that plaintiff was not delayed more than 60 days; the contracting officer negotiating such time extension did not intend to adjudicate any question of liability for unreasonable delay.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Howard H. Moore, King & King, and Stanley, Vitousek, Pratt & Winn* were on the briefs.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea,* for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a Hawaiian corporation with its principal place of business in Honolulu, where it is engaged in the general construction business.

2. November 30, 1932, plaintiff entered into a contract with the defendant through the Office of the Supervising Architect, Treasury Department, which provided that plaintiff should—

> furnish all labor and materials, and perform all work required for the demolition and removal of existing structures and for the construction of an Administration Building, Detention Building, Lounging Shed Building, Garage and Waiting Pavilion Building and Gardener's Cottage, together with all service lines, walls, fences, curbs, driveways, walks, filling of the site, approach work and mechanical and kitchen equipment of the United States Immigrant Station, Honolulu, Territory of Hawaii, per bid No. 1 (for the construction complete of all work shown on the drawings and described in the specifications), for the consideration of three hundred thirty-six thousand dollars ($336,000.00) * * *.

The specifications prepared by defendant and under which plaintiff submitted its bid provided that the work should be

completed within 480 calendar days from the date of receipt of notice to proceed. Notice to proceed was received by plaintiff January 5, 1933, which, under the foregoing contract and specifications, fixed May 1, 1934, as the completion date.

The specifications further provided that existing buildings at the site would be occupied by the defendant until the new buildings were completed, after which plaintiff would carry out the demolition of the existing buildings.

3. In general, the several buildings were constructed with fabricated steel framework; exterior or curtain walls built of hollow structural tile and covered with stucco or plaster; concrete floor decks or slabs; and concrete roofs covered with tile. The detention building and the administration building were the largest and the principal buildings. The former and a relatively small central section of the latter were two stories in height, and the remainder or principal part of the latter and the other buildings were one story in height.

4. The specifications and drawings called for an ornamental frieze or belt course of architectural terra cotta which extended around the exterior of the detention building at the height of the lower part of the second story windows, and in a similar location on the second story of the central section of the administration building. The walls of the buildings were twenty-two inches thick where the belt course appeared and that course extended into the walls approximately six inches, thus becoming a bearing unit in the wall. The belt course became window sills where windows occurred in line with it. Architectural terra cotta was used around practically all windows in both the administration and detention buildings and certain openings in the lounging shed. In addition architectural terra cotta was used as a facing or trim in certain other places on the buildings as more specifically enumerated in the succeeding finding.

5. The original drawings which were furnished plaintiff showed the various places where architectural terra cotta would be used and showed that full-size detail drawings would be furnished for the architectural terra cotta window sills on the first and second floors and the belt course on the second floor of the detention building, for exterior grills

and their ashlar frames at the entrance of the administration building, for interior grills in the entrance of the administration building, for a cornice under the eaves of the administration building, and for window caps on the second floor of the detention building.

The contract drawings also showed that full-size details and plaster models would be furnished for columns and pilaster bases, corbels, brackets and joints, and a cornice over the exterior grills of the administration building; for panels in the entrance of the administration building at the clearstory level; for columns and column caps on the first and second floors of the detention building, and for columns, pilasters, and caps on the first floor of the detention building.

The contract drawings did not specifically indicate that the full-size details would be required for window caps and sills on the first and second floors of the administration building, the belt course on the second story of the administration building, or for window sills in the lounging shed; but, in view of their similarity to corresponding parts of the detention building, both parties understood that full-size details would be required and supplied for these items and such details were actually supplied.

6. The specifications contained the following provisions:

> 24. DRAWINGS.—The general character of the detail work is shown on the contract drawings, but minor modifications may be made in the full size drawings or models. The contractor shall not set out any part of the work requiring full size drawings or models until he has received the same.
>
> * * * * *
>
> 43. MODELS.—The Government will furnish the models indicated on the drawings. Any additional models of rights, lefts, miters, etc., and any patterns required shall be provided by the contractor.

December 1, 1932, the Acting Supervising Architect forwarded to plaintiff certain "Instructions for the information and guidance of contractors transacting business with the Office of the Supervising Architect," which instructions contained the following provision:

Contractors are not required to submit full-size drawings, nor will consideration be given to the approval of any except shop drawings.

All full-size details considered necessary for the successful prosecution of the work will be prepared by this office, and one copy will be furnished free of charge to the contractor; any additional copies required must be obtained at the contractor's time and expense from the originals on file in this office.

Particular attention is invited to full-size detail drawings which are marked Standard Drawings. In each case where standard drawings are supplied, three copies of these details will be given to the contractor, but it must be understood that it will be impossible to obtain additional copies, and the greatest care should be taken of such drawings.

7. Most of the essential building materials required for carrying out the work under the contract were not manufactured or produced in Hawaii but were obtained from the United States and shipped by vessel from San Francisco. A substantial part of the work was let out to subcontractors, including the hollow or structural tile and ornamental terra cotta work, the plastering, painting, plumbing, electrical work, roofing tile work, the placement of reinforcing steel, sheet metal work, and the terrazzo work. Plaintiff began its work during the early part of February 1933.

8. Prior to the receipt of notice to proceed, namely, December 22, 1932, plaintiff placed an order with the Honolulu Iron Works Company, a Honolulu concern, for all exterior architectural terra cotta needed in the construction of the project, and that company in turn promptly placed an order with Gladding McBean & Company of California for that material. The latter concern was the largest terra cotta manufacturer west of the Rocky Mountains, one of the largest in the United States, and the nearest to Hawaii. Before it could proceed with the manufacture of the architectural terra cotta it was necesary for it to have full-size details and models, and immediately after the receipt of the order it notified the Honolulu Iron Works Company of its need for these full-size details and models. The latter company transmitted this information promptly to plaintiff.

In addition to oral requests, the Honolulu Iron Works Company on behalf of plaintiff requested the defendant's representative by letter on February 2, 1933, to furnish the full-size details for the architectural terra cotta and a similar request was made by Gladding McBean & Company on March 3, 1933. Similar efforts on the part of plaintiff and its subcontractors to secure the full-size detail drawings and models continued until these drawings were finally delivered to Gladding McBean & Company. Plaintiff's letter of June 19, 1933, to the defendant's construction engineer, reads in part as follows:

> This delay is going to prove very expensive to us. We anticipated starting the setting of terra cotta the first of August. Our overhead is about $2,000 per month so you can see that this delay will be very expensive.

September 6, 1933, plaintiff advised the defendant's representative that the delays were going to be expensive and it would have to pass this additional cost on to the Department. September 8, 1933, the defendant's representative replied that "the matters mentioned will be taken into consideration when final settlement of the contract is made." The full-size details were not forwarded to plaintiff's subcontractor until August 16, 1933, and the models were not forwarded until September 12, 1933.

9. The delay in furnishing the full-size details for architectural terra cotta to the manufacturer, referred to in the preceding finding, was due in large part to a misunderstanding or disagreement between Herbert C. Cayton, who was the defendant's construction engineer and representative at the site, and the Supervising Architect of the Treasury. Prior to the letting of the contract, Cayton had been employed under a contract with the Treasury Department to prepare the plans and drawings for this project and in that work he was associated with another architect, C. W. Dickey. After the contract was let, Cayton was relieved of his duties as the architect and appointed as construction engineer to supervise the construction of the project. Under the arrangement between Dickey and Cayton, Dickey prepared the preliminary sketches and Cayton prepared the

working drawings, specifications, and detail drawings. After the contract had been let, Cayton began the preparation of the detail drawings. These detail drawings had to be approved by the Supervising Architect of the Treasury. Among the detail drawings which Cayton agreed to prepare were those for the architectural terra cotta. March 1, 1933, Cayton forwarded three-inch scale detail drawings for the architectural terra cotta to the Supervising Architect of the Treasury instead of the full-size detail drawings required by the plans and specifications. The three-inch scale detail drawings were returned to Cayton by letter dated March 22, 1933, because they were not full-size details. Cayton then conferred with a representative of the Honolulu Iron Works and on April 8, 1933, wired the Supervising Architect that the manufacturer of the terra cotta, in order to save delay, was willing to prepare terra cotta shop drawings and models from the three-inch scale details which Cayton had prepared. April 17, 1933, the Treasury Department by telegram requested Cayton to submit a proposal of the deduction which he would make under his contract with the Treasury Department in the event the three-inch scale details were used instead of the full-size details as called for by his contract. May 18, 1933, Cayton replied by letter to the Treasury Department that he would make no reduction in his contract price on account of the change, and on June 7, 1933, the Treasury Department replied by telegram that the full-size terra cotta detail drawings were required and that the three-inch scale details were not acceptable.

Thereafter, a short delay ensued while Cayton located the draftsman who had originally been employed by him in the preparation of the three-inch details and whom he eventually employed to prepare the full-size details. The full-size details for the architectural terra cotta were completed about five weeks after the receipt of the Treasury Department's telegram of June 7, 1933, and were then forwarded to the Supervising Architect, who approved them. They were forwarded to the manufacturer August 16, 1933. The time ordinarily required for the manufacture of architectural terra cotta of the type involved in this project is from two to four months and the time required for its

shipment from the manufacturer here involved to Honolulu is approximately two weeks.

Some delay also occurred in the forwarding by the defendant to plaintiff of the models which were to be furnished by the defendant to plaintiff under the plans and specifications. This delay was occasioned by certain new policies which had been adopted by the defendant as a result of which the contract for the preparation of the models was not awarded until May 25, 1933. Thereafter the contractor for the models had to await the preparation by Cayton of full-size details, and the models were not completed and shipped until September 12, 1933.

10. In general, plaintiff made satisfactory progress on the detention building to about July 11, 1933, and on the administration building to about August 11, 1933. The steel framework on the detention building was completed by July 1, 1933, and its concrete roof was poured by July 11, 1933. Three or four days later the forms were stripped. At that time some of the concrete floors had been poured. The administration building was in similar states of advancement approximately a month later than the dates just mentioned. By July 11, 1933, in the case of the detention building, and by August 11, 1933, in the case of the administration building, no exterior or interior walls had been constructed. Before architectural terra cotta could be made use of on these buildings, the exterior walls had to be constructed up to the points where the terra cotta was to be inserted.

Plaintiff's plan of operation had been to proceed immediately with the erection of the exterior walls of the two buildings on or shortly after the respective dates of July 11, 1933, and August 11, 1933, referred to above, and as the walls were erected to install architectural terra cotta at its appropriate places. As heretofore shown, it was known in July and August 1933, that there was going to be a serious delay in the delivery of this terra cotta and that it would be at least two or three months before delivery could be expected. The starting of the exterior walls so long in advance of the time when they could be carried to their ultimate completion would not have been in the interest of efficiency, and they were not started until September 19,

1933, on the administration building, and October 10, 1933, on the detention building. And even after they were started, plaintiff could not carry them to their completion above the location of the belt course around the second story of the detention building and above a like location in the central section of the administration building until the terra cotta arrived. The completion of the interior walls was also delayed because of the connection of the interior with the exterior walls, as were other parts of the buildings which would normally follow the completion of the exterior and interior walls.

The belt course of architectural terra cotta was a structural part of the exterior walls extending approximately six inches into these twenty-two-inch walls. While it would have been possible to leave a space for the architectural terra cotta in the belt course, to leave the windows for later completion, and otherwise to finish the exterior walls, such procedure would have been impractical and also would not have been good construction for the reason that, if inserted later, these materials would not have integrated properly with the parts of the walls built earlier. It would also have entailed additional work and greater expense.

11. The first shipment of architectural terra cotta arrived November 15, 1933, and the rest of it was received between that date and January 12, 1934. During the period from July 11 to November 15, 1933, plaintiff carried forward its work, though at a disadvantage for the reason that it could not complete the walls and follow the orderly course of procedure which it had planned. Among other things it became necessary to rearrange the order of the work and transfer men from one place to another on the job.

During that period, work was done which, in addition to that on the exterior and interior walls referred to in the preceding finding, included pouring floor slabs, installing roofing tile, plumbing and electrical work, grading and building driveways with their curbing and gutters, erecting fences, and other items which were not interfered with by the late arrival of the terra cotta.

During the period from July and August 1933 until the architectural terra cotta was delivered, plaintiff kept many

of its desirable employees on the job and used them as efficiently as it could under the circumstances, but the piecemeal character of their work was generally less efficient than it would have been if the project could have been carried forward in an orderly manner. At that time plaintiff was performing no other work to which such employees could have been transferred, and it was to its advantage to keep its organization intact in order that it might have it available for the completion of this job.

12. The buildings were substantially completed by May 19, 1934, and occupied by defendant's representatives on that date, after which plaintiff began the demolition of the old buildings and the completion of miscellaneous work such as building fences, concrete roads, walks, curbs, and grading. The work was actually completed in accordance with the plans and specifications July 10, 1934.

13. A reasonable time for the completion of the work under the contract, considering all features, including the work to be done, where it was to be performed, and the time ordinarily required for contemplated approval of models and drawings in Washington, D. C., was 450 days. Plaintiff was delayed 90 days beyond the time when it would have completed the contract because of defendant's delay in furnishing full-size detail drawings and models for the architectural terra cotta, and incurred additional expense on account thereof as shown in the succeeding finding.

14. During the ninety-day period of delay, which is chargeable to the acts or failures to act of the defendant, plaintiff had increased costs as follows:

(a) *Field office overhead*, which consisted of full-time employees who were regularly employed on the job and who were paid a stated weekly or monthly salary:

Resident Engineer—3 months @ $450	$1,350.00
Timekeeper—90 days @ $39.50 per week	507.85
Carpenter Foreman—90 days @ $48 per week	617.15
Watchman—90 days @ $14.40 per week	185.14
Workmen's Compensation and Public Liability Insurance	66.44
Water and Electricity—3 months @ $22.88	68.64
	2,795.22

(b) *General office overhead.*—At that time plaintiff was carrying on certain work in addition to this contract, and the entire general office overhead is allocated in the proportion which the direct labor on this contract bears to the entire direct labor involved on all contracts, excluding work under subcontracts. Such an allocation attributes 70 percent of plaintiff's overhead to this job. The general office overhead items follow:

Item	Amount
President	$1,800.00
Stationery and Supplies	15.75
Rent, Taxes, and Other Expenses of Waimanu St. Yard	262.50
Draftsman	63.00
Treasurer	195.30
Stenographer	49.50
Janitor	14.00
Workmen's Compensation and Public Liability Insurance	1.90
Rent, Taxes, and Expenses of Main Office on Young Street	112.00
	2,513.95

(c) Reasonable rental value of equipment during ninety-day period of delay, $2,802.00.

15. The evidence is insufficient to support a finding of what amount, if any, plaintiff's costs were increased on account of lack of efficiency of its labor caused by the delay, or as to what increased costs it may have incurred because of increases in wages, caused by the delay, due to the operations of the Public Works Administration and the Civil Works Administration.

16. Prior to the completion of the contract, namely, March 16, 1934, plaintiff by a letter requested an extension of sixty days, the letter reading as follows:

> Reference our contract for Immigrant Station, Honolulu, T. H.
>
> We request 60 days extension of completion date on above contract. This request is based on tardy delivery of plans for the terra cotta.
>
> All of our delivery dates of other materials were based on delivery of terra cotta.
>
> The aluminum sash, screens and grills could not be placed until terra cotta was in place.
>
> The attached copies of letters show the delay occasioned us by tardy delivery of terra cotta and they also show our persistent effort to have delivery made sooner.

We believe the Adminstration Building, Detention Building, Cottage, and Garage, may be occupied prior to completion date May 4th leaving only the completion of the pavement under existing building and removal of existing building and installation of 5 toilets that may be delayed in the pavilion.

17. August 15, 1934, Cayton, the construction engineer, recommended that the request for an extension of time be granted, such letter containing the following statements:

> Delay in the completion of the entire project was due to the following causes:
>
> (1) Delay in the delivery of Architectural Terra Cotta due in part to delayed delivery of full size details.
>
> (2) Delay in delivery of other materials due to the unsettled condition of industries in general during the economic depression—and uncertainty in the workings of the National Recovery Administration.
>
> * * * * *
>
> In my opinion, the delays were occasioned by circumstances beyond the control of the Government or the Contractor.
>
> I, therefore, respectfully recommend that Liquidated Damages be waived in whole.
>
> The contract was prosecuted by the Contractor in good order and the result is eminently satisfactory.
>
> I respectfully recommend that the work be accepted and final payment made.

18. September 26, 1934, the Director of Procurement for the Treasury Department replied as follows to plaintiff's request for an extension:

> Reference is made to your letters of March 16 and July 13, 1934, regarding the delay caused by the lack of full-size details and models for terra cotta work in connection with your contract for the construction of the Immigrant Station, Honolulu, Territory of Hawaii.
>
> While the construction contract was awarded on November 30, 1932, it was not until May 25, 1933, that we were able to award the contract for the models. This was due to the promulgation of new policies by the new administration. After the model contract was awarded further delay was incurred due to the misunderstanding of the Architect with regard to the preparation of full-size details for the terra cotta work. Some correspond-

ence took place on this subject before the Architect supplied the necessary full-size details for the models, and on account of the great distance between Honolulu and Washington considerable time elapsed in the transmission of correspondence. The full-size details were not finally approved and sent out until August 16, 1933, and the models which were affected thereby were not shipped until September 12. After the receipt of the models by your subcontractors, it was necessary to fabricate and deliver the material involved.

As the time lost awaiting the delivery of the terra cotta due to the conditions outlined above also held up the delivery of other materials which were scheduled to follow the installation of the terra cotta, it appears that you suffered delay beyond your control on this account. Sixty (60) additional days as requested in your letter of March 16 are therefore considered reasonable, and under Article 9 of your contract due note of this delay will be made at time of final settlement.

19. November 24, 1934, the Director of Procurement recommended to the Secretary of the Treasury that all liquidated damages for delay be waived, his recommendation reading in part as follows:

The following delay reported by the contractors has been established as correct by investigation of the Division and is of a character excusable under Article 9 of the contract:

Sept. 26, 1934—Delay in receiving full size details and models for terra cotta work, 60 days.

The time for completion, including the above noted delay, therefore became June 29, 1934.

The Construction Engineer states in his final report of August 15, 1934, that the work was substantially completed on May 19, 1934, on which date the buildings were occupied; that after occupancy the old buildings were demolished and that this part of the work was completed by July 10, 1934, with the exception of a few minor items. These items were corrected by August 15, 1934. He further states that the contract was prosecuted by the contractors in good order with eminently satisfactory results, and recommended that no damages be assessed as the delay was due to delivery of materials and beyond the control of the contractors.

It appears that there was no delay in completion of the work for all practical purposes, and that the delay in demolition of the old buildings was not due to any negligence on the part of the contractors.

That recommendation was approved by the Acting Secretary of the Treasury November 24, 1934. Payment of the final balance under the contract was made December 13, 1934. In signing the final voucher, plaintiff's representative placed a statement thereon that "This voucher is signed without waiver of our right to later file claim."

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff built various buildings at the United States Immigrant Station in Honolulu, Hawaii. Its contract called for the completion of the work within 480 days after receipt of notice to proceed. This time for completion was set by the defendant in its invitation for bids, and was not, as is sometimes done, made an element upon which each bidder makes his offer, with consideration given, in awarding the contract, to a promise of early completion. The contract did, however, contain the usual provision for an agreed sum per day to be assessed against the contractor if he was late in performing, unless he could show certain named excuses for his lateness.

In the contract, the defendant agreed to furnish certain detail drawings and certain models for the manufacture of ornamental terra cotta specified to be used by plaintiff in the construction of some of the buildings. Because of a disagreement between the Treasury Department and a person in Hawaii whom it had employed to make the detail drawings, the drawings were not supplied to the terra cotta manufacturer until August 16, 1933, though plaintiff's contract had been awarded on November 30, 1932, and notice to plaintiff to proceed had beeen given on January 5, 1933. In the case of the models, a "change of policy" in the Department in regard to letting contracts for the manufacture of the models was the cause of a delay almost as long. These failures to furnish detail drawings and models agreed to be furnished by the defendant extended far beyond the time which the parties contemplated when they made the contract, and constituted a breach of contract by the defendant. The defendant so admits. Plaintiff claims this breach of contract delayed the completion of the work by some twenty-two

weeks and caused plaintiff serious financial losses. The defendant disputes the extent of plaintiff's delay and the amount of its loss.

We have found that plaintiff was delayed ninety days by the defendant's lateness in furnishing the drawings and models. Plaintiff was ready to use the terra cotta in the Detention Building by July 11, but did not receive any terra cotta until November 15, 1933. There was corresponding delay as to the Administration Building. These dates would indicate a longer delay than the ninety days which we have found, but plaintiff was able, in the meantime, to accomplish a good deal on other parts of the project, and it is not proved that the intervening time was completely lost.

The defendant asserts that plaintiff could not have been delayed more than seventy days because it completed the job within seventy days after the date called for in the contract. But the evidence persuades us that, if plaintiff's work had not been delayed by the defendant's breach of contract, it would have completed it some time before the agreed date. The contract contained no promise that plaintiff would not complete the work before the agreed date, and gave the defendant no right to unreasonably prevent earlier completion. *Blair* v. *United States*, No. 43548, decided October 5, 1942. (99 C. Cls. —)

We think the fact that plaintiff requested, and the defendant granted, only a sixty-day extension of time beyond the agreed date for plaintiff to complete the contract does not prove that plaintiff was not delayed more than sixty days. Plaintiff and the officer with whom he negotiated the sixty-day extension both understood that the purpose of the extension was to relieve plaintiff of the assessment of liquidated damages for completion later than the time fixed in the contract. Plaintiff asked for only such time as he needed for that purpose. The Contracting Officer did not intend to adjudicate any question of liability for unreasonable delay.

We have awarded plaintiff only the expense to which it was put in keeping on the job its superintendent, foreman, timekeeper, and watchman; certain insurance and public utility costs; the rental value of certain machines; and an appropriate part of its main office overhead expense during

the period of delay. Plaintiff did not satisfactorily prove its loss due to the inefficiency of its labor caused by the irregular manner in which it was compelled to do its work, nor the extent to which the delay carried it into a period of higher wage costs because of the National Industrial Recovery Act and accompanying legislation and governmental action.

Plaintiff will be awarded a judgment for $8,111.17.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

LAWRENCE G. SMITH v. THE UNITED STATES

[No. 44666. Decided February 1, 1943]

On the Proofs

Government property; Army officer's responsibility; requisitions and receipts signed in blank and clothing issued in absence of officer; violation of Army regulations.—Where plaintiff, an Army officer, while serving as recruiting officer and commanding officer of the depot force at an Army post, where it was his duty to equip recruits with uniforms and other clothing in accordance with Army regulations; and where contrary to regulations (A. R. 35–6560, par. 11c (1) and (2)) plaintiff permitted clothing to be drawn in his absence and on requisitions previously signed by him in blank; and where in plaintiff's absence his Supply Sergeant withdrew on such previously signed requisitions, and also on forged requisitions, and disposed of, certain clothing issued to fictitious recruits; it is *held* that plaintiff under the 83rd Article of War (41 Stat. 804) was liable for his proper part of the loss both on clothing drawn on forged forms and on forms signed in blank, and accordingly plaintiff is not entitled to recover.

Same; conflict between orders of Commanding Officer and Army regulations.—Where plaintiff, acting as Recruiting Officer and Commanding Officer of the Depot Force at an Army post, was instructed by his Commanding Officer to furnish recruits with uniforms within 20 minutes of their arrival at the post; and where plaintiff had numerous other duties at such post which made it not possible for him always to comply with said instructions without violation of Army regulations as to the issuing of uniforms and clothing; and where plaintiff, faced with the dilemma of disobeying his Commanding Officer or violating Army regulations, signed requisitions and receipts in blank and permitted clothing to be issued

in his absence, all contrary to Army regulations, and resulting in loss to the Government; it is *held* that plaintiff was responsible for such loss and accordingly plaintiff is not entitled to recover deductions from his pay made to cover his proportion of such loss.

Same.—A soldier's highest duty is to obey Army regulations and he is not bound to obey any order in conflict therewith.

Same.—Express authority for departing from Army regulations is required.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. C. Stephens, Jr.*, was on the brief.

The court made special findings of fact as follows:

1. Plaintiff was appointed a Cadet, United States Military Academy, June 14, 1917, and served as such to June 27, 1918, and again from August 31, 1918, to June 15, 1920. On July 2, 1920, he was appointed a 2nd Lieutenant of Cavalry. He was promoted to 1st Lieutenant, to rank from July 2, 1920, and on December 15, 1922, he was discharged as a 1st Lieutenant and appointed a 2nd Lieutenant under the Acts of June 30, 1922, and September 14, 1922. He was promoted to 1st Lieutenant April 7, 1925; to Captain on August 1, 1935, and to Major in August 1940.

2. December 3, 1924, the plaintiff was assigned to duty as Recruiting Officer and Commanding Officer of Depot Force, D. E. M. L., Sixth Corps Area, Fort Sheridan, Illinois. The plaintiff served in this capacity until September 5, 1925, when he was ordered to duty as Assistant Professor in Military Science and Tactics at the University of Georgia. D. E. M. L. stands for Detached Enlisted Men's List.

3. From October 1, 1924 to May 1, 1925, one Private Donald Kline from time to time withdrew from the clothing warehouse clothing and other supplies and illegally disposed of them. Private Kline was acting supply sergeant under plaintiff's predecessor and continued in that capacity under plaintiff until May 1, 1925, when the thefts were discovered.

4. As the Commanding Officer of the Depot Force, D. E. M. L., it was plaintiff's duty to equip the recruit with cloth-

ing upon his arrival at the depot. Clothing for this purpose was drawn from the Quartermaster Depot as each recruit arrived on a form known as Q. M. C. Form No. 165, designated "Individual Clothing Slip." At the top of the clothing slip was a request signed by the Commanding Officer requesting the Quartermaster to issue the articles enumerated below. At the bottom of the form was a receipt for the clothing issued, to be signed both by the recruit and the officer who received the clothing. The last paragraph of the "Instructions" on the back of the clothing slip reads as follows:

> At the end of the month, or whenever an organization leaves the vicinity of the issuing quartermaster for an extended period, the organization commander will compare his Abstract of Clothing Drawn (Form No. 180) with the quartermaster's Abstract of Clothing Issued (Form No. 180), as explained on that form.

5. The pertinent provisions of Army Regulations relative to the issuance of clothing (Sec. 11, A. R. 35–6560) are as follows:

> a. (2) Normally clothing will be issued in bulk to the company or detachment commander once each quarter. When necessary it may be issued to the individual enlisted man.
>
> b. (1) When clothing to be charged to enlisted men against their clothing money allowance is desired in bulk, the company or detachment commander will prepare a requisition in duplicate on the prescribed form, enumerating the articles and sizes needed and showing the total required. After approval by the commanding officer of the regiment, etc., the two copies of the requisition will be sent to the post, camp, or station quartermaster who will prepare the items for issue and enter in column "Issued" on both copies the quantities that can actually be supplied. The quartermaster will send due notice to the company or detachment commander when the clothing is ready for issue. After verifying the quantities of clothing entered in column "Issued," the company or detachment commander or an officer designated by him will sign on both copies a receipt to the effect that he has received the articles enumerated in column "Issued." The quartermaster or his representative issuing the clothing will sign a statement on both copies to that effect. The articles will then be removed from the quartermaster's storehouse. The duplicate copy of the requisition will

be turned over to the company or detachment commander or his representative at the time of issue of the clothing and the original filed as a voucher to the quartermaster's property account.

The company or detachment commander or his representative will at once issue the clothing to the enlisted men. The issuing officer will enter on the request submitted by each enlisted man the quantities issued, initial the slip, and obtain the man's receipt at the time of issue. He will also enter the articles on the clothing account of the individual equipment record (Form No. 637, A. G. O.).

* * * * *

c. (1) Where the issue of clothing to the individual enlisted man is necessary, individual clothing slips in duplicate, numbered serially for the month or period and enumerating the articles needed, will be prepared by the company or detachment commander. The quantities and sizes desired will be entered by the company or detachment commander, except that for men not yet fitted sizes may be filled in at the time of issue after proper size has been determined by try on.

* * * * *

(2) At the time of issue to individual enlisted men the quartermaster or his representative will enter the quantities and sizes of the articles issued, initial the slip in space "Issued by," and obtain the man's receipt on both copies. A line will be drawn through each blank space in column "Quantities issued" on both copies by the quartermaster or his representative before the man signs the receipt. The "original" will be retained by the quartermaster as a voucher to his stock record account and the "duplicate" returned to the company or detachment commander or his representative at the time of issue, or returned at the close of the business day in a sealed envelope to the company or detachment commander who will immediately enter the articles on the individual equipment record, Form No. 637, A. G. O., and the money value on Q. M. C. Form No. 166-A, filing the duplicate individual clothing slip with the Form No. 166-A until the next visit of the inspector.

Paragraph *d* of section 13, A. R. 35-6520, reads as follows:

The property responsibility of a company or detachment commander cannot be delegated to enlisted men. It is his duty to attend personally to its security and to superintend issues himself or to cause them to be superintended by a commissioned officer.

Section 1*d* of A. R. 35-6560 reads as follows:

> The giving or taking of receipts in blank for public property is prohibited.

6. Plaintiff had many other duties to perform in addition to his duties as Recruiting Officer and Commanding Officer of the Depot Force, D. E. M. L. He was Post Ordnance Officer, Post Engineer Officer, Post Chemical Warfare Officer, Post Salvage Officer, Mess Officer, Officer in Charge of the Officers' Club property, and Officer in Charge of the polo stables. In addition to these regular duties, he was Plans and Training Officer of Troop B, which demanded his attention for some portion of the day for about three days a week, and he was also a member of a General Court-Martial, which met on the average of about twice a week. All of plaintiff's regular duties required daily supervision, and a number of them involved property accountability.

7. From eight to thirty recruits arrived at the depot daily. The Post Commander, plaintiff's Commanding Officer, had directed plaintiff to equip them with uniforms within twenty minutes after their arrival. On account of plaintiff's many other duties it was impossible for him always to be present when clothing was issued to recruits and, in an effort to comply with the orders of the Post Commander, he signed twelve or fourteen of the individual clothing slips in blank, signing both the requisition for the clothing and the receipt therefor, and left them with his Supply Sergeant with directions to him to fill in the name of the recruit and the quantity of clothing required and to take the recruit to the Quartermaster Depot and draw the clothing, whether or not plaintiff was present. The Supply Sergeant drew clothing in the absence of plaintiff and also, as hereinafter more fully stated, sometimes in the absence of the recruit.

This practice had been initiated by plaintiff's predecessor, but the testimony fails to show that it was done at the direction of or with the approval of the Post Commander.

8. During January and February 1925 the plaintiff made a number of oral requests on the Post Commander for additional help to carry on and discharge the many duties assigned to him. In March following, he made a written

request on the Post Commander for additional help, but no additional help was given him.

9. Clothing was issued to Private Kline on these requisitions sometimes when the recruit was not present. This was done without plaintiff's knowledge. From December 3, 1924, when plaintiff was assigned to duty as Recruiting Officer and Commanding Officer of the Depot Force, D. E. M. L., to May 1, 1925, Private Kline drew from the quartermaster depot for fictitious recruits clothing of a total value of $2,801.02, and later illegally disposed of the same. Of this amount $988.96 worth was recovered, leaving a net loss to the defendant of $1,812.06. Plaintiff was charged with $1,013.30 thereof. Against this amount plaintiff was credited with $87.25, which was deducted from the pay of Private Kline, leaving a balance of $926.05. Of this amount a total of $701.05 has been deducted from plaintiff's pay.

Of the clothing fraudulently withdrawn by Private Kline, $24.66 of it was drawn on Q. M. C. forms No. 165 which had been signed by plaintiff in blank. The balance of it was drawn on forged individual clothing slips.

10. For some reason, unexplained by the record, the duplicates of the clothing slips on which clothing was fraudulently withdrawn by Private Kline were not returned to the plaintiff as required by Army Regulations, and plaintiff did not discover the thefts until May 1, 1925, when he reported the matter to his Commanding Officer.

11. On October 1, 1925, a Board of Officers consisting of three majors was appointed to make an investigation of the fraudulent withdrawal of clothing from the clothing warehouse by Private Kline. Later Kline was court-martialed and his civilian confederates were convicted in the Federal Court.

The Board found the plaintiff, Lieutenant Williams, and Sergeant Annen partially responsible for the loss and made allocations of it to them as follows:

The plaintiff	$1,013.30
Lieutenant Williams	726.70
Sergeant Annen	72.06
Total	1,812.06

Neither Lieutenant Williams nor Sergeant Annen were under the supervision or control of plaintiff.

The Board of Officers found that the failure on the part of plaintiff to comply with regulations in regard to drawing clothing and the failure of Lieutenant Williams, Q. M. C., to enforce regulations made it possible for Private Kline to commit his illegal transactions.

The Board of Officers recommended the relief of plaintiff from accountability and responsibility on account of the loss by the thefts. In support of this recommendation the Board cited the many duties of plaintiff, the extenuating circumstances set out in its record of proceedings, and that plaintiff had been officially reprimanded for administrative irregularities.

The Post Commander in an order approved the findings of the Board of Officers, but disapproved relief of plaintiff from accountability and responsibility for the loss as recommended by the Board. He also disapproved a like recommendation of the Board for the relief of Lieutenant Williams. In making his decision he said in part:

> The method employed, in signing forms in blank by Lieutenant Smith and the permitting by Lieutenant Williams of the issue of clothing from the warehouse without the presence of a commissioned officer, opened wide the doors of fraud.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues for $701.05, the amount deducted from his pay to reimburse the defendant for clothing stolen from it by plaintiff's acting Supply Sergeant, Private Kline. Plaintiff was the Recruiting Officer and the Commanding Officer of the Depot Force, D. E. M. L., Sixth Corps Area, Fort Sheridan, Illinois. As such it was a part of his duty to equip recruits with a uniform and other clothing. In doing so it is alleged he failed to comply with Army Regulations and that this enabled his Supply Sergeant to steal and dispose of clothing for which plaintiff was accountable in the above amount.

Under Army Regulations clothing was normally issued in bulk to the company or detachment commander, and by him issued to the recruit, but where necessary it was permitted that it be issued direct to the enlisted man (A. R. 35–6560, 11*a* (2)). Where issued in bulk the procedure prescribed was as follows: The company or detachment commander prepared a requisition on the quartermaster in duplicate on Q. M. C. Form No. 165 for each enlisted man for whom clothing was desired. When the clothing was issued the company or detachment commander signed a receipt therefor at the place provided on the requisition, and the quartermaster initialed the duplicate and turned it over to the company or detachment commander. Upon receipt of the clothing the company or detachment commander issued it to the enlisted man, obtaining therefor the enlisted man's receipt at the place provided therefor on said Q. M. C. Form No. 165.

Where it was necessary for the clothing to be issued by the quartermaster direct to the enlisted man the procedure was substantially the same, except that the quartermaster secured the receipt of the enlisted man and forwarded the duplicate to the detachment commander.[1]

At this post the practice was followed of making issues to the individual recruits direct and not to the detachment commander in bulk.

[1] A. R. 35–6560, par. 11c (1) and (2), provide:

c. (1) Where the issue of clothing to the individual enlisted man is necessary, individual clothing slips in duplicate, numbered serially for the month or period and enumerating the articles needed, will be prepared by the company or detachment commander. The quantities and sizes desired will be entered by the company or detachment commander, except that for men not yet fitted sizes may be filled in at the time of issue after proper size has been determined by try on.

* * * * *

(2) At the time of issue to individual enlisted men the quartermaster or his representative will enter the quantities and sizes of the articles issued, initial the slip in space "Issued by," and obtain the man's receipt on both copies. A line will be drawn through each blank space in column "Quantities issued" on both copies by the quartermaster or his representative before the man signs the receipt. The "original" will be retained by the quartermaster as a voucher to his stock record account and the "duplicate" returned to the company or detachment commander or his representative at the time of issue, or returned at the close of the business day in a sealed envelope to the company or detachment commander, who will immediately enter the articles on the individual equipment record, Form No. 637, A. G. O., and the money value on Q. M. C. Form No. 166–A, filing the duplicate individual clothing slip with the Form No. 166–A until tle next visit of the inspector.

Paragraph 13*d* of A. R. 35–6520 required that all issues, whether in bulk or to the individual enlisted man, be made in the presence of a commissioned officer. Plaintiff did not comply with this regulation, but permitted clothing to be drawn by his acting Supply Sergeant on requisitions previously signed by him in blank. Plaintiff had also signed in blank receipts for the clothing to be drawn. This was in violation of paragraph 1*d* of A. R. 35–6560.

When drawing clothing the Supply Sergeant did not always take with him the recruit for whom it was desired, and clothing was issued to him in the absence both of the recruit and a commissioned officer.

This system made it possible for the Supply Sergeant to draw clothing for fictitious recruits and to fraudulently dispose of it. This he did on requisitions and receipts previously signed in blank by plaintiff or on requisitions and receipts forged by him.

Plaintiff admits liability for the clothing drawn on requisitions and receipts signed by him, but denies liability for that drawn on forged ones; but had plaintiff complied with the Army Regulation which required him to be present when clothing was drawn, it would have been impossible for the clothing to have been drawn on the forged requisitions and receipts as well as on those signed in blank. Plaintiff, therefore, under the 83rd Article of War (41 Stat. 804),[2] would be liable for his proper part of the loss both on clothing drawn on forged forms and on those signed in blank, unless his defense is good that it was impossible to comply with these Army Regulations on account of his many other duties.

In addition to his duties as Recruiting Officer and Commanding Officer of the Depot Force, plaintiff was the Post Ordnance Officer, the Post Engineer Officer, the Post Chemical Warfare Officer, Post Salvage Officer, Mess Officer, Officer in Charge of the Officers' Club property, and Officer in Charge of the polo stables. In addition to these regular duties, plaintiff was the Plans and Training Officer of Troop

[2] *Military property—Willful or negligent loss, damage, or wrongful disposition.*—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

B, which demanded his attention for some portion of the day for about three days a week, and he was also a member of a General Court-Martial, which met on the average of about twice a week. Recruits arrived at the post at all hours of the day, and plaintiff's Commanding Officer had told him personally that he wanted them in uniform within twenty minutes of their arrival.

Plaintiff says it was impossible to comply with this order and perform his other duties, many of which also involved property responsibility. There is nothing in the record to contradict this statement, it appears entirely plausible, and it is accepted as true.

Plaintiff, then, was faced with the dilemma of disobeying his Commanding Officer and letting recruits wait for their uniforms until he could be present, or of violating Army regulations, signing requisitions and receipts in blank and letting the clothing be issued in his absence. He chose the latter course.

A soldier's highest duty is to obey army regulations, and he is not bound to obey any order in conflict therewith. When, therefore, it became apparent to plaintiff that he could not comply with the order to equip recruits within twenty minutes after arrival and comply with Army regulations, it was his duty to call that fact to his commanding officer's attention and to attempt to secure a revision of the order. He was unwarranted in assuming responsibility for setting aside the regulations. He should have put that responsibility where it belonged, on the officer issuing the order making compliance impossible.

We are not convinced that post headquarters sanctioned the signing of requisitions and receipts in blank, or the issuance of clothing in the absence of a commissioned officer, as alleged. We are also of the opinion that plaintiff's request for assistance was not enough to relieve him of his dereliction. Express authority for departing from army regulations was required.

Defendant's officers were within their legal rights in making the deductions from plaintiff's salary. Morally, plaintiff's claim has much to commend it to one who can give relief on such a ground, but we can render judgment only

on a claim supported by the law as it is written. To relieve him of the harshness of the application of the law to this particular case plaintiff can only appeal to Congress.

It results that plaintiff is not entitled to recover. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

OTTO BRIMBERRY v. THE UNITED STATES

[No. 44921. Decided February 1, 1943]

On the Proofs

Suit for salary; discharged employee of War Department, who is Army veteran with honorable discharge; not under civil service.—Where plaintiff, a veteran of the World War I, honorably discharged from the Army, received a temporary, emergency appointment as a clerk in the Quartermaster Corps of the War Department, not under the civil service, and his salary was paid from funds of the Civilian Conservation Corps, which was a temporary agency; and where under an order directing the reduction in the force of civilian employees of the Civilian Conservation Corps, plaintiff was discharged on December 31, 1937, and was reinstated on May 24, 1938; it is *held* that plaintiff is not entitled to recover his salary for the interim.

Same.—The provisions of Section 4 of the Appropriation Act for 1912, (37 Stat. 360, 413), that "in the event of reductions made in the force of any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary", and the pertinent provisions of the Civil Service Rules and Regulations issued pursuant to said statute (section 5 of Civil Service rule XII) do not apply to plaintiff, who was appointed outside civil service.

Same; extension of civil service preference regulations to agencies that were to be made permanent; authority of the President.—Circular No. 146 of the Civil Service Commission, dated October 22, 1936, inviting attention of all Governmental agencies to the fact "that in making a reduction in force, even in an organization excepted from the Civil Service Act and Rules, it is necessary to observe the retention preference laws," and stating that "the President of the United States has informed the Civil Service Commisison that it is his desire that in making any reductions of force the Civil Service rules be applied by all agencies which are going to be on a permanent basis," conferred on plaintiff no right to his office or position

since it is not shown that said circular No. 146 was authorized by the President; nor is it shown that the President authorized the extension of the provisions of section 5 of Civil Service Rule XII to persons holding excepted positions in the regular branches of the Government; nor that plaintiff was an employee of an agency which was to be on a permanent basis.

Same; status of plaintiff as temporary employee of War Department not under civil service.—While plaintiff was paid out of Civilian Conservation Corps funds, allocated to the War Department, plaintiff was an employee of the War Department, holding a temporary position under an emergency appointment, not under civil service.

Same; status of Civilian Conservation Corps employees.—The Civilian Conservation Corps was an emergency agency, created by Congress to relieve unemployment, and under the statute (50 Stat. 319) its civilian personnel was appointed "without regard to the civil service law and regulations," and the President was without power to give to such employees a right of action against the United States in case the rules applicable to employees in the classified civil service were violated. *Perkins* v. *United States*, 58 C. Cls. 199, affirmed 116 U. S. 483, cited.

Same; discretion to determine qualifications of employees; jurisdiction; Act of 1876 not violated.—Plaintiff's discharge was not in violation of the Act of 1876 (19 Stat. 143, 169), which provides that "in making any reduction of force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States" (U. S. Code, Ttitle 5, section 37,) since his superiors had determined that he was not equally qualified with those employees who were retained and this determination was fairly and impartially made; such determination is final and the Court has no authority to review it. *Keim* v. *United States*, 33 C. Cls. 174, affirmed 177 U. S. 290, 35 C. Cls. 628; and *Bratton* v. *United States*, 90 C. Cls. 604, cited.

The Reporter's statement of the case:

Mr. Otto Brimberry, pro se.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On May 16, 1934, plaintiff received a temporary, emergency appointment, outside civil service, as a clerk, CAF–1, in the Quartermaster Corps of the War Department, Camp Custer Civilian Conservation Corps District, Camp Custer,

Michigan, with salary payable from funds of the Civilian Conservation Corps. Plaintiff's grade was raised to CAF-2 on May 1, 1935, and he was again promoted, to CAF-3, on October 1, 1937, in which grade he continued to serve until December 31, 1937, when he was dropped from the service in the course of a reduction of personnel.

2. Plaintiff was a member of Company A, 327th Infantry, United States Army, during World War I, and was honorably discharged.

3. At the time of plaintiff's separation from the service of the Quartermaster Corps section 4 of Civil Service Rule XII provided as follows:

> In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good; or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.

4. Departmental Circular No. 146, directed by the Civil Service Commission to the Heads of Departments, Independent Establishments, and Emergency Agencies, on October 22, 1936, reads as follows:

> Attention is respectfully invited to the fact that in making a reduction in force, even in an organization excepted from the Civil Service Act and Rules, it is necessary to observe the retention preference laws. The Acts of August 15, 1876 (19 Stat. 169), and August 23, 1912 (37 Stat. 413), grant preference of retention to ex-service employees at the seat of government who are equally qualified with non-service employees being retained or whose records are good.
>
> Section 5 of Civil Service Rule XII directs:
>
> "In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good; or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service."
>
> The President of the United States has informed the Civil Service Commission that it is his desire that in making reductions of force the civil service rules be

applied by all agencies which are going to be on a permanent basis. The provisions of Section 5 of Civil Service Rule XII should therefore be applied regardless of the place of employment, and should also be applied in the regular branches of the Government in making reductions in force in excepted positions.

5. As a result of an investigation conducted by direction of the Inspector General of the Army, plaintiff was reinstated in his former employment and classification on May 24, 1938.

It is not shown that at the time of his discharge plaintiff had been rated for efficiency by his superiors, and it is not shown whether or not at that time he was as equally qualified to perform the duties assigned to him as those who were retained.

6. On May 26, 1938, plaintiff addressed to the Quartermaster General his claim for "pay as Clerk CAF-3 Quartermaster General's Section, Headquarters Camp Custer CCC District from January 1, 1938, to May 23, 1938, inclusive." During such period plaintiff had no employment, and was ready and willing to perform any duty which might have been required of him.

7. This claim was denied by the Acting Comptroller General on October 18, 1938, on the ground that appropriations available for the payment of Government employees may be used to pay salaries only for periods during which services were rendered, and, since no services were rendered by plaintiff, there was no authority of law under which plaintiff could be paid.

8. If plaintiff's employment had not been interrupted, his salary for the period in question (nine and one-half pay periods) would have amounted to $641.25.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 31, 1937, plaintiff was a clerk, outside civil service, in the Quartermaster Corps of the War Department, Camp Custer Civilian Conservation Corps District, with salary payable from funds of the Civilian Conservation

Corps. On that date he was dropped from the service in the course of a reduction of personnel. He was reinstated on May 24, 1938. He sues to recover his salary in the interim, amounting to $641.25, on the allegation that his dismissal was unlawful.

Apparently, it is his insistence that it was unlawful because of the provisions of section 4 of the Appropriation Act for 1912, c. 350, 37 Stat. 360, 413, and of section 5 of Civil Service rule XII, and of Departmental Circular 146 of the United States Civil Service Commission, dated October 22, 1936.

Section 4 of the Act referred to directs the Civil Service Commission to establish a system of efficiency ratings "for the classified service in the several executive departments in the District of Columbia. * * *" It provides that all promotions, demotions, or dismissals shall be governed by civil service rules, and contains this proviso, upon which plaintiff relies:

> In the event of reductions being made in the force of any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

This statutory provision was followed by Civil Service rule XII, sec. 5, reading as follows:

> In harmony with statutory provisions, when reductions are being made in the force, in any part of the classified service, no employee entitled to military preference in appointment shall be discharged or dropped or reduced in rank or salary if his record is good; or if his efficiency rating is equal to that of any employee in competition with him who is retained in the service.

Both the statute and the rule plainly relate only to the classified civil service and, therefore, do not relate to plaintiff, who was appointed outside civil service.

But he says both the statute and the rule were made applicable to persons outside civil service by Circular No. 146 of the Civil Service Commission, the first paragraph of which reads as follows:

> Attention is respectfully invited to the fact that in making a reduction in force, even in an organization

excepted from the Civil Service Act and Rules, it is necessary to observe the retention preference laws. The Acts of August 15, 1876 (19 Stat. 169), and August 23, 1912 (37 Stat. 413), grant preference of retention to ex-service employees at the seat of Government who are equally qualified with non-service employees being retained or whose records are good.

The Circular then quotes section 5 of Civil Service Rule XII, and proceeds:

> The President of the United States has informed the Civil Service Commission that it is his desire that in making any reductions of force the civil-service rules be applied by all agencies which are going to be on a permanent basis. The provisions of section 5 of Civil Service Rule XII should, therefore, be applied regardless of the place of employment, and should also be applied in the regular branches of the Government in making reductions in force in excepted positions.

It may be said in the beginning that the provisions of this circular can confer on plaintiff no right to his office or position unless, in any event, its provisions were authorized by the President. Nowhere is the Civil Service Commission given the power to prescribe rules regulating the appointment and removal of employees, except those employees who come within the classified civil service. Our attention has been directed to no order of the President extending civil service rules to persons outside the classified civil service. The only action taken by him with reference thereto is that indicated by this Circular No. 146, which recites:

> The President of the United States has informed the Civil Service Commission that it is his desire that in making any reductions of force the civil service rules be applied by all agencies which are going to be on a permanent basis.

The first question presented, therefore, is whether or not plaintiff was an employee of such an agency. Plaintiff's case depends upon an affirmative answer to that question. If the answer is in the negative, plaintiff acquired no right by virtue of Circular No. 146, even though the Civil Service Commission stated therein that it was necessary that the retention preference laws be observed by an organization

excepted from the Civil Service Act. There is no showing that the President authorized it to promulgate such an order; nor is there any showing that the President authorized it to extend the provisions of section 5 of Civil Service Rule XII to persons holding excepted positions in the regular branches of the Government.

Was, then, the plaintiff an employee of an agency which was going to be on a permanent basis, and if that question is answered in the affirmative, did the President have power to extend the Civil Service Act and rules to persons excepted therefrom by Congress?

At the time of his dismissal plaintiff held a temporary position under an emergency appointment in the Quartermaster Corps of the War Department with salary payable from the funds of the Civilian Conservation Corps. The Quartermaster Corps of the War Department is of course a regular branch of the Government and, therefore, the President's instruction, if such it can be termed, that the civil service rules should be applied to agencies about to go on a permanent basis, would have no application to plaintiff as one of its employees, unless because he was paid from funds of the Civilian Conservation Corps; that is to say, unless plaintiff can be treated as an employee, not of the War Department, but of the Civilian Conservation Corps. We do not think he can be so regarded.

The Civilian Conservation Corps was established by the Act of June 28, 1937, c. 383, 50 Stat. 319. It had formerly operated under the Emergency Relief Act of 1933 (c. 30, 48 Stat. 55). Under the Act of June 28, 1937, in force at the time of plaintiff's discharge, the Director of the Civilian Conservation Corps was authorized to utilize the services of such departments of the Government as he deemed necessary in carrying out the purposes of the Act, and when such departments were used, the Director was given authority to allocate to them funds appropriated for carrying on the work of the Civilian Conservation Corps. Pursuant to this power money was allocated to the War Department and plaintiff was paid out of these funds; but, nevertheless, he was an employee of the War Department, and not of the Civilian Conservation Corps. That Corps had no control or super-

vision over plaintiff; he was subject only to the orders of the War Department. He was not an employee of one of those "agencies which are going to be on a permanent basis."

Moreover, the Acts under which the Civilian Conservation Corps functioned show on their faces that that agency was merely temporary and there is no proof to show it was to be put on a permanent basis. For this reason, also, plaintiff has not shown that he acquired whatever benefits may have been conferred by Circular No. 146.

But even if plaintiff might be regarded as an employee of the Civilian Conservation Corps, and even though it had been shown that this Corps was one of those "agencies which are going to be on a permanent basis," we do not think that he is entitled to the benefits of the above quoted section 5 of Rule XII, because the Civilian Conservation Corps Act authorizes the appointment of civilian personnel "without regard to the civil service law and regulations."

The Civilian Conservation Corps was a temporary organization created under emergency legislation to relieve unemployment; it was shortly to be discontinued, and evidently Congress did not intend that its employees should acquire the status of employees in permanent agencies under the classified civil service. The authorization was to appoint employees, but that authorization was coupled with the proviso that such employees should not acquire civil service status.

In 32 Op. A. G. 274, the Attorney General said:

> Where a statute creates a position in the executive civil service, appointments to which are not subject to confirmation by the Senate and which is not that of a mere laborer or workman, that position must be filled in accordance with the Civil Service Act and Rules unless the statute clearly indicates an intention to the contrary. But Congress may authorize certain positions to be filled without regard to the Civil Service Act and Rules, and where it has done so it has itself determined that the public welfare will be best promoted if the discretion of the appointing officer in making appointments to and removals from those positions is unrestricted.

We are of opinion that Congress intended that such employees should not secure the protection against removal accorded to employees in the classified civil service. If this was in fact the intention of Congress, the President was without power to give to such employee a right of action against the United States in case the rules applicable to employees in the classified civil service were violated.

It was recognized by this court and by the Supreme Court in *Perkins* v. *United States*, 58 C. Cls. 199, 116 U. S. 483, that under section 2 of Article II of the Constitution Congress in granting the power of appointment of inferior officers to the heads of departments may limit and restrict the power of their removal as it deems best for the public interest. In that case the Supreme Court adopted the following language from our opinion:

> * * * We have no doubt that when Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto.

This was later approved by the Supreme Court in *Myers* v. *United States*, 272 U. S. 52, 160.

In the case at bar Congress has said that employees appointed under the Civilian Conservation Corps Act by the Director may be removed at the will of the appointing power, and it has given the same power to the Secretary of War. When so removed, they have been removed in the manner provided for by Congress and, therefore, have no cause of action against the United States. The President cannot create in this employee a right of action against the United States not given him by Congress.

Undoubtedly, the President has the right to formulate rules for the guidance of his subordinates in their dealings

with their employees, and he can direct them to give preference to honorably discharged veterans in reducing their force, but he cannot by so doing confer on such employee a right of action against the United States not given him by Congress.

In 37 Op. A. G. 13, the Attorney General said:

> When Congress provides that a position shall not be subject to the provisions of the Civil Service Act and Rules, it discloses its intention that a person appointed to such a position shall not be entitled to the benefits of the Civil Service Act and Rules with respect to his employment in the excepted position. Accordingly, he is not while holding such position entitled to the benefits of the Retirement Act nor to security of tenure he would have enjoyed had the position not been excepted by law.

We do not think the opinion we have expressed is in conflict with the decision of the Supreme Court in *United States* v. *Wickersham*, 201 U. S. 390. The plaintiff there had been placed in the classified civil service by order of the President and the act of the Secretary of the Interior in pursuance thereof. This was done in pursuance of the power granted by the Civil Service Act of January 16, 1883 (22 Stat. 403) directing the heads of the departments, "on the direction of the President" to classify their employees, and authorizing him to provide rules and regulations for appointments to the positions so classified. As an incident of that power of appointment, he was authorized to make rules and regulations governing their removal. *Ex parte Hennen*, 13 Pet. (U. S.) 230; *Blake* v. *United States*, 103 U. S. 227; *Keim* v. *United States*, 177 U. S. 290; *Shurtleff* v. *United States*, 189 U. S. 311; *Burnap* v. *United States*, 252 U. S. 512; *Myers* v. *United States*, *supra*. Among those regulations was one reading:

> No removal shall be made from any position subject to competitive examination, except for just cause and upon written charges filed with the head of the department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense.

The court held that the plaintiff was entitled to the benefits of this order, and that, having been discharged contrary to it, he was entitled to recover the compensation of which he had been deprived. But the order of the President in the *Wickersham* case was made in pursuance of authority granted by Congress. In the case at bar Congress has said that this employee could be removed at will, and it follows that if so removed, he has no right of action against the United States.

For many years the Civil Service Commission and the executive departments have believed it to be beyond the power of the President to place under civil service persons excepted therefrom by Congress. In order to give him this power, Congress passed the Act of November 26, 1940, c. 919, 54 Stat. 1211. Under this Act the President was authorized "notwithstanding any provisions of law to the contrary, * * * by Executive order to cover into the classified civil service any offices or positions in or under an executive department, independent establishment, or other agency of the Government * * * ." If the President already had this power, the passage of this Act was useless.

On December 31, 1937, when plaintiff was discharged, the President did not have power to give him the rights to which members of the classified civil service were entitled. We seriously doubt if he meant to undertake to do so. Circular 146 of the Civil Service Commission does no more than recite a "desire" on the part of the President that civil service rules be applied by certain agencies. This amounts, we think, to nothing more than an expression of a wish on his part that these agencies do so. From it, we do not think there can be gleaned an effort on his part to confer on the employees of such agencies a right of action against the United States if these rules were not complied with.

However, the Appropriation Act of 1876 (c. 287, 19 Stat. 143, 169) provides:

> In making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors.

This statute was passed sometime prior to the establishment of the Civil Service Commission and applies to all civil employees in the executive departments. It would appear, therefore, that plaintiff's dismissal was contrary to law, if he was equally qualified with those who were retained; but there is no competent evidence in the record on this question and the plaintiff's case must fail, therefore, for want of proof.

On the taking of testimony plaintiff was not represented by counsel; he was questioned by the commissioner and by defendant's attorney. No appearance was made for him when the case came on for argument. On the hearing defendant's attorney introduced in evidence, for some reason not apparent to the court, a photostatic copy of the War Department's file on this case. This was offered with this reservation:

> While the decisions of the court are to the effect that such reports, or rather the contents of such reports, are not competent evidence and are not admitted for that reason, I am, however, permitting this report to go in evidence with her consent.

(The reference is to the consent of plaintiff's attorney to whom the case was originally assigned, but who was ill at the time testimony was taken.)

The parties having consented that this file be received in evidence, we have examined it to see what is disclosed on the question of whether or not the plaintiff was equally qualified with those who were retained.

It shows that an order was issued by the Headquarters, 6th Corps Area, directing the reduction in force of civilian employees of Camp Custer Civilian Conservation Corps from 122 to 48. As a result thereof, Captain Passink, the District Quartermaster, directed First Lieutenant Rackes, who was plaintiff's immediate superior, to submit the names of five of his civilian employees for discharge. Among the names submitted was the plaintiff's.

Plaintiff protested against his discharge, and enlisted the services of both Senator Prentiss Brown of Michigan and of the American Legion to secure his reinstatement. A number of letters appear in the file from Senator Brown

and from John Thomas Taylor, the Director of the National Legislative Committee of the American Legion. The case reached the office of the Secretary of War, who eventually directed the Inspector General to make an investigation. One of his assistants examined a number of witnesses, 27 in all, including the plaintiff and those called by him, and concluded, among other things—

> Because Lieutenant Rackes believed that Mr. Brimberry was not as efficient as the employees chosen for retention, and that the remaining personnel would function more harmoniously without Mr. Brimberry, the latter's discharge was recommended by Lieutenant Rackes.
>
> * * * * *
>
> * * * this officer was justified in arriving at the conclusion that his section would be improved by dispensing with the services of Mr. Brimberry.

Plaintiff worked in the supply office; he was in charge of one section of it. A Mr. Eadler, another ex-service man, was in charge of another section, and Mrs. Bond was in charge of a third. Only these three employees had a rating of CAF-3, and they were the only ones acting in a supervisory capacity. When the order came through for a reduction in force, Lieutenant Rackes had to determine which one of the three should go. He determined that the good of the service would be served best by letting plaintiff go. His action evidently was not arbitrary or capricious nor inspired by dislike for the plaintiff, as the Inspector General found. Captain Passink, Lieutenant Rackes' superior, testified that he and Lieutenant Rackes—

> * * * spent a great deal of time discussing it back and forth. It wasn't a snap judgment. At the time of reduction of force, we spent more time discussing Mr. Brimberry's case than we did of all the other employees, due to the fact that he was a veteran. * * *

He says that they determined that the plaintiff's efficiency rating was not equal to the other members of their force in Brimberry's classification; that Mr. Brimberry had had no experience in the work being done by Mr. Eadler and Mrs. Bond, and that they thought that the two latter persons could best carry on the combined work.

Syllabus

Major Putnam, the District Commander, says that he discussed plaintiff's dismissal with Captain Passink and Lieutenant Rackes and approved it. He concluded his testimony with this statement:

> I and Captain Passink and Lt. Rackes anticipated this. Therefore, we gave this case, in particular and in general, five times as much thought to the termination of Mr. Brimberry's services to that of any other person and I still am of the opinion that we were right and that Mr. Brimberry was not unfairly treated.

The determination of whether or not Mr. Brimberry was equally qualified with those retained was committed to his superiors and this court has no authority to review that determination. *Keim* v. *United States*, 177 U. S. 290; *Bratton* v. *United States*, 90 C. Cls. 604.

We conclude from an examination of this file that plaintiff's superiors determined that he was not equally qualified with those retained and that this determination was fairly and impartially made. If so, there has been no violation of the Act of 1876, *supra*.

For the reasons stated, plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

BOARD OF DIRECTORS, ST. FRANCIS LEVEE DISTRICT v. THE UNITED STATES

[No. 45188. Decided February 1, 1943]

On the Proofs

Grant under Title II of National Industrial Recovery Administration Act; definition of "material"; project under Flood Control Act of 1928.—Where plaintiff, a public corporation organized under the laws of Arkansas for the protection of lands within plaintiff's district from inundation by the flood waters of the Mississippi River, entered into assurances to provide rights-of-way for the foundations of levees and borrow pits to be constructed by the Federal Government under the provisions of the Flood Control Act of 1928 (45 Stat. 534); and where plaintiff thereafter entered

into a loan agreement with the Government under Title II of the National Industrial Recovery Administration Act (49 Stat. 195); whereby the Government promised to make a loan to plaintiff, and did make such loan, and further promised after completion of the project to make to plaintiff a grant "of not to exceed 30 percent of the cost of the labor and materials employed upon the project," the proceeds from the sale of bonds to be used by the borrower for providing rights of way for foundations for levees, for borrow pits for material comprising the levees, for paying for damages to property and for other purposes set forth in the said loan agreement; it is *held* that the amount paid out by plaintiff to purchase land which was to be excavated by the Government Engineers to obtain earth with which to build the levees was not includable as the cost of "materials" and plaintiff is not entitled to recover.

Same.—Plaintiff in buying the land for rights-of-way for the location on the levees and for borrow pits did not "employ" the earth which made up the land which it bought.

Same.—Plaintiff under the loan agreement was not entitled to a grant for materials which were intended to be used by another, the Government, through the United States Engineers, in the carrying out of the other's project, the building of levees.

Same; approval by resident engineer of accounting method not binding.—Where the defendant's resident engineer approved plaintiff's method of keeping records in which plaintiff apportioned the cost of land bought (some of which was for the site of the levee and some for borrow pits) to "foundation" and "material", respectively, in the proportion in which the land was to be used for these purposes; it is *held* that such approval did not bind either the resident engineer or the defendant to plaintiff's interpretation of the contract.

The Reporter's statement of the case:

Mr. Richard B. McCulloch for the plaintiff. *Mr. Burk Mann* was on the brief.

Mr. Currell Vance, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a public corporation organized under No. 19 of the Private Acts of 1893 of the General Assembly of the State of Arkansas as a Special Improvement District for the protection of lands within its limits from inundation by flood waters of the Mississippi River. Plain-

tiff was created for the purpose of building, rebuilding, enlarging, and maintaining levees on the west bank of the Mississippi River from the Missouri-Arkansas State line to the mouth of the St. Francis River, near Helena, in Phillips County, Arkansas, a distance of approximately 160 miles. The land within the area of the District comprised 1,600,000 acres.

2. By Act No. 22 of the Private Acts of 1897 of the General Assembly of the State of Arkansas, plaintiff was authorized to issue bonds, and the bonds hereinafter referred to were issued pursuant to such authority. Prior to the passage of this act plaintiff acquired funds to carry on its activities from taxation, and thereafter from both taxation and the issuance of bonds.

3. Under the Flood Control Act of 1917 the Federal Government assumed one-third of the cost of the construction of levees; under the Flood Control Act of 1924 two-thirds of the cost; and under the Flood Control Act of 1928 the Federal Government assumed the entire cost of actual construction, reconstruction, enlargement, and replacement of levees to conform to what is known as the Jadwin plan. Under this plan local authorities, such as plaintiff, were required to provide the rights-of-way for the foundations of the levees and for the borrow pits for material composing the levees. The levees were constructed of earth obtained from borrow pits. Under the Jadwin plan the levees were made 3 feet higher than they had been, which required additions to the slopes of the levees and broadening of the bases for levee foundations. Pursuant to the requirements of the Flood Control Act of 1928 plaintiff during the fall of 1928 entered into an assurance agreeing to perform the obligations set out in Paragraph 3 of said act.

4. The Jadwin plan contemplated a 10-year period of construction, beginning in 1929. However, upon the passage of the National Industrial Recovery Act on June 16, 1933, and the inauguration of the President's Reemployment Program, the United States Engineers, in furtherance of this program, determined to accelerate their plans for levee construction in the Mississippi Valley. While the costs of

actual levee construction were to be borne by the United States, the acceleration of the Jadwin plan required plaintiff to furnish rights-of-way for levee foundations and for borrow pits for material composing the levees, which plaintiff had planned to acquire only as needed over a period of several years. At this time, due to the depression, plaintiff was having difficulty in meeting its bond payments and expenses of administration.

5. Prior to the passage of the National Industrial Recovery Act on June 16, 1933, plaintiff had made application to the Reconstruction Finance Corporation for a loan of $500,000 to provide funds by which it could meet its obligations under the Flood Control Act of 1928. This application was withdrawn by plaintiff because of the adoption of the provisions of Title II of the National Industrial Recovery Act, which made it possible for plaintiff to borrow money at a lower rate of interest and to obtain a grant from the Government of not to exceed 30 percent of the money which it might expend for specified purposes.

6. September 5, 1933, plaintiff made application to the Federal Emergency Administration of Public Works for a loan in the amount of $552,000. This application was approved and on April 17, 1934, plaintiff and the Government entered into a Loan Agreement, which is plaintiff's Exhibit 4 and is made a part hereof by reference.

7. Paragraph 1 of Part One of the Loan Agreement reads in part as follows:

GENERAL PROVISIONS

1. *Amount of Loan and Grant, Purchase Price and Purpose.*—Subject to the terms and conditions of this Agreement, the Borrower will sell and the Government will purchase $552,000, aggregate principal amount of the bonds (herein called the "Bonds"), of the Borrower (being part of an authorized issue of $1,500,000, at 100 per centum of the principal amount thereof plus accrued interest, and the Government will make a grant (herein called the "Grant"), to the Borrower, as provided in Paragraphs 7 and 8, PART TWO, hereof, of not to exceed 30 per centum of the cost of the labor and materials employed upon the Project as herein described, the proceeds from the sale of the bonds to be

used by the Borrower for providing rights-of-way for foundations for levees along the west bank of the Mississippi River from the Missouri-Arkansas State line to the mouth of the St. Francis River, for borrow pits for material composing the levees, providing local drainage, maintenance of the levees, paying for damages to property occasioned by building the levees, removing houses, and patrolling and guarding the levees during construction (herein called the "Project"), and for incidental purposes; all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 953, the proceedings authorizing the issuance of the Bonds, Title II of the National Industrial Recovery Act (herein called the "ACT"), approved June 16, 1933, * * *.

8. Paragraphs 7 and 8 of Part Two of the Loan Agreement cited in the preceding finding read as follows:

7. *Grant Requisition.*—Within a reasonable time after the Project has been completed and all costs incurred in connection therewith have been determined, the Borrower may file a requisition with the Government requesting the Government for the Grant. Such Grant requisition shall be accompanied by such documents as may be requested by Counsel for the Government.

8. *Grant: Cancellation of Bonds.*—In the event that Other Funds shall be less than 30 per centum of the cost of the labor and materials employed upon the Project, and if, within a reasonable time after the completion of the Project, the Borrower shall have filed with the Government the Grant requisition, and if the documents accompanying the same are satisfactory in form, sufficiency and substance to Counsel for the Government, then subject to the terms and conditions of this Agreement, the Government will cancel, insofar as possible, and in such order as may be satisfactory to the Finance Division, Bonds and/or coupons in an aggregate amount equal to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and Other Funds; and for such reasonable time and to this end, the Government will hold Bonds in such amount as may be necessary to effectuate the purpose and intent of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. Pursuant to the terms of the Loan Agreement plaintiff issued and sold to the United States its bonds in the amount of $451,000, and the proceeds were used by plaintiff for the purposes specified in the Loan Agreement.

10. By June 15, 1935, plaintiff had bought and paid for the land necessary for the foundations of the levees, and for borrow pits, and had done the other things called for in its agreement, and had thus completed the project specified in the Loan Agreement. In due course and pursuant to the provisions of the Loan Agreement, plaintiff applied to the defendant for the grant promised in the agreement. In making its requisition plaintiff included in the grant base, of which 30 percent was to be paid it by way of grant, the sums of money expended by it in the purchase of borrow-pit lands for material to be used by the United States Engineers in the construction of the levees. The defendant excluded these sums from the grant base and, after an audit of the remaining items claimed, paid plaintiff as its grant the aggregate sum of $7,324.34. At plaintiff's request, the Public Works Administration reviewed its decision and reaffirmed it, the Assistant Administrator writing to plaintiff in part as follows:

> * * * Our Agreement with the District was to pay a grant of 30 percent of the cost of the labor and materials employed upon a particular project described in the Loan Agreement of April 17, 1934. The material from the borrow pits was not employed upon such project, but upon an entirely different project carried on by the Corps of Engineers. That, as I see it, is the insurmountable obstacle to our giving favorable consideration to your request.

11. By stipulation plaintiff has waived all items in controversy except its claim for the grant of 30 percent of the money spent by it in the purchase of lands from which material was taken and used in the construction or enlargement of the levees. The only issue now involved in this suit is whether or not the sums of money spent by plaintiff in the purchase of borrow-pit lands, from which material was taken and used by the United States Engineers in levee construction, should be included in the grant base.

12. Prior to June 16, 1933, the date of the passage of the National Industrial Recovery Act, plaintiff expended the sum of $25,014.06 for borrow-pit lands, and subsequent to that date $75,521.59. In addition it paid $1,144.61 as interest on the sum of $25,014.06, and $1,214.61 as interest on the sum of $75,521.59, all of which interest was for time subsequent to June 16, 1933. All the borrow-pit lands so purchased by plaintiff were purchased for the purpose of enabling the United States Engineers to obtain earth to be used in constructing the levees.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff is a public corporation set up under the laws of Arkansas for the protection of lands within plaintiff's district in that state from inundation by the flood waters of the Mississippi River. Plaintiff was at the time here relevant authorized to raise money by taxation and by issuing bonds.

Under the Flood Control Act of 1928 (45 Stat. 534), the Federal Government undertook the entire cost of construction, reconstruction, enlargement and replacement of levees to conform to the Jadwin plan of flood control. Local authorities, such as plaintiff, were required by this act to provide the rights-of-way for the foundations of the levees and for the borrow pits for earth to be removed and built into the levees. In 1928, plaintiff entered into the assurance required by the Flood Control Act, to provide these rights-of-way.

The Jadwin plan contemplated the construction of the levees over a period of ten years, beginning in 1929, and plaintiff planned to acquire the rights-of-way, as needed, over this period. When the National Industrial Recovery Act was passed on June 16, 1933, the United States Engineers, who had charge of levee building, decided to accelerate the levee-building program, in order to further reemployment and relieve economic depression. Plaintiff, even before this change of plans, had intended to borrow

money to perform its part of the flood-control program. On September 5, 1933, it applied for a loan under Title II of the National Industrial Recovery Act, under which it could borrow money at a low rate of interest and, in addition, could obtain a grant of 30 percent of certain of its expenditures.

The application was approved in the amount of $552,000, and on April 17, 1934, plaintiff and the Government entered into a loan agreement, pertinent parts of which are quoted in Findings 7 and 8. In the agreement the Government promised to make a grant to plaintiff, after completion of the project, "of not to exceed 30 percent of the cost of the labor and materials employed upon the Project as herein described, the proceeds from the the sale of bonds to be used by the Borrower for providing rights-of-way for foundations for levees along the west bank of the Mississippi River from the Missouri-Arkansas State line to the mouth of the St. Francis River, for borrow pits for material composing the levees, providing local drainage, maintenance of the levees, paying for damages to property occasioned by building the levees, removing houses, and patrolling and guarding the levees during construction (herein called the 'Project') and for incidental purposes; * * *."

Plaintiffs borrowed only $451,000 under the arrangement. It used the money for the purposes specified and fulfilled its part of the agreement. It then made a requisition for the grant of 30 percent promised in the agreement, including as a cost of "materials" the amount which it had paid out in purchasing land which was to be excavated by the United States Engineers to obtain earth with which to build the levees. The amount spent for this purpose was about $100,000, one-fourth of it having been spent before the passage of the National Industrial Recovery Act and the balance thereafter. The defendant made a grant to plaintiff of $7,324.34, which was 30 percent of its expenditures for labor and materials, not including the cost of these borrow-pit lands. The defendant refused the 30 percent grant as to the cost of the borrow-pit land on the

ground that the earth from the land was not "employed" upon plaintiff's "project."

We think the defendant's refusal was correct. Plaintiff's "project" for which it borrowed the money was an unusual one. Plaintiff was not to use the borrowed money to build levees. It was to use it to fulfill its prior commitment to furnish rights-of-way for the location of the levees, and for the removal of earth to be put into the levees, which levees were to be built by the United States Engineers, and to perform certain work of maintenance, drainage, and inspection. As to the rights-of-way for borrow pits, as well as to the rights-of-way for the location of the levees, plaintiff's project was merely to acquire them and pay for them. Plaintiff did not in any sense "employ" the earth which made up the land which it bought, in buying the land. It may have employed "labor," in the way of surveyors, title searchers, and appraisers. It is hard to imagine any materials which may have been used, except possibly boundary markers. For such labor and materials it presumably received its grant. But it was not entitled to a grant for materials which were intended to be used by another person, the Government, through the United States Engineers, in the carrying out of that person's project, the building of the levees.

The defendant's resident engineer approved plaintiff's method of keeping records in which it apportioned the cost of land bought (some of which was for the site of the levee, and some for borrow pits) to "foundation," and "material", respectively, in the proportion in which the land was to be used for those purposes. Plaintiff urges that that approval was a contemporary construction of the contract to the effect that borrow-pit land was "material." We think that this sanction of an orderly method of keeping accounts and preserving information as to the items of cost entering into the levee as it would be finally constructed did not commit even the defendant's resident engineer to plaintiff's interpretation of its contract. And even if the resident engineer had so interpreted it, it would not bind the defendant, plaintiff's conduct in the performance of its contract not having been affected by the engineer's misinterpretation.

The Government contends that even if the plaintiff's project had included the building of the levees, the cost of the earth in place before it was removed to the levee would not have been a cost of "material" employed upon the project, because the earth in place is land and not "material" within the meaning of the agreement. Our impression is that this contention is unsound, but it is not necessary to decide the question. Neither is it necessary to decide whether the money expended by plaintiff for borrow-pit lands before the passage of the National Industrial Recovery Act, or the interest paid to vendors of the land on the purchase price, could have been properly included in the grant base, if we had taken a different view of the question of what was plaintiff's project.

Plaintiff is not entitled to recover. The petition is dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOHN H. RANKIN, SOLE SURVIVING AND LIQUIDATING MEMBER OF THE PARTNERSHIP FIRM OF RANKIN & KELLOGG v. THE UNITED STATES

[No. 45200. Decided February 1, 1943]

On the Proofs

Rental of space by Government; parol contract; violation of statute.—The general rule is that a parol contract fully executed by a contractor on his part, wherein the United States receives all the benefits of the undertaking, imposes a liability upon the latter as upon an implied contract. However, when a public officer has violated a penal statute by using, or attempting to use, his office for his own pecuniary benefit, the rule in such cases is that the act done in violation of the statutory prohibition is void and confers no rights upon the wrongdoer.

The Reporter's statement of the case:

Mr. Paul F. Myers for the plaintiff. *Mr. Yale L. Schekter* was on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* was on the brief.

The court made special findings of fact as follows, upon the stipulation of facts entered into by the plaintiff and defendant:

1. Plaintiff, John H. Rankin, Thomas M. Kellogg and John S. Schwacke were the members of a partnership firm of architects which engaged in business in the City of Philadelphia, Pennsylvania, under the name of "Rankin & Kellogg" by virtue of an agreement entered on June 30, 1926. Thomas M. Kellogg died July 8, 1935; John S. Schwacke and John H. Rankin continued the business as liquidating partners until December 8, 1935, when John S. Schwacke died. Plaintiff is, and, at all times since December 8, 1935, has been the sole surviving and liquidating partner of the firm of Rankin & Kellogg.

2. On May 28, 1940, plaintiff filed a petition in this court under the provisions of Section 145 of the Judicial Code to recover for the rental of space on the 23d floor, Architects Building, Philadelphia, Pennsylvania, pursuant to an alleged contract between plaintiff's firm and the Federal Works Progress Administration.

3. On or about July 9, 1935, John Rankin, in his individual capacity, was appointed Director of the Fourth Pennsylvania District by the duly authorized Pennsylvania State Director of the Federal Works Progress Administration. The Pennsylvania State Director instructed Rankin to return at once to Philadelphia and establish the Works Progress Administration offices for the Fourth Pennsylvania District. In accordance with his instructions Rankin at once organized a Works Progress Administration staff, setting up temporary quarters in the offices of his partnership firm of Rankin & Kellogg and immediately notified the State Director of this fact.

4. Shortly thereafter Rankin secured bids on suitable office space at six locations near the center of the City of Philadelphia. The lowest bid was that of Architects Building Corporation which offered space in the Architects Building

at a rental of $1.04 per square foot (including light, heat, water, power and elevator service). At the time Rankin & Kellogg had under lease from Architects Building Corporation the entire 23d floor of the Architects Building, consisting of 4,100 square feet, at a rental of $1.50 per square foot per annum. The partnership did not need a large part of this space because its practice had been suspended to a considerable extent by reason of conditions incident to and following the depression. It was important to the success of the Works Progress Administration that it begin to function as rapidly as possible. The space under lease to Rankin & Kellogg was in a thoroughly modern and centrally located building and was available immediately at a rental of $1.04 per square foot per annum which was the lowest price obtainable for similar office space. There was sufficient furniture and equipment available without charge in Rankin & Kellogg's offices so as to enable the District office to begin immediate operations. The Works Progress Administration had no furniture and there was sufficient furniture, drafting tables and other equipment available without charge in Rankin & Kellogg's offices so as to enable the District office to operate until its needs could be supplied from Works Progress Administration sources. Rankin was anxious to establish Works Progress Administration offices in his own office because of its desirable location, the convenience of the office, and the fact that he could continue to use his own personal office and furnishings which he had spent considerable care in developing and selecting. The Works Progress Administration, on July 16, 1935, entered into the actual possession and use of the entire 23d floor of the Architects Building.

5. About this time the Pennsylvania State Director of the Works Progress Administration and his deputy visited the Philadelphia office and discussed with Rankin the availability of the 23d floor for permanent Works Progress Administration offices. At the same time Rankin fully disclosed to the Pennsylvania State Director and his deputy all the facts with respect to his membership in the firm of Rankin & Kellogg, the firm's lease for the 23d floor of the Architects Building, the firm's ownership of stock in the

Architects Building Corporation, and his individual relationship to the Architects Building Corporation. When the State Director learned that Rankin & Kellogg could conveniently turn over the premises to the Works Progress Administration he authorized negotiations to be entered into looking toward a lease under which the Works Progress Administration would take over and occupy the entire 23d floor of the Architects Building at a rental rate of $1.04 per square foot per annum. Thereafter, Rankin, with the knowledge and approval of the State Director, undertook to negotiate a lease between the Architects Building Corporation and the Works Progress Administration for the leasing of the 23d floor to the Works Progress Administration. On August 7, 1935, Rankin sent to the State Works Progress Administration office a request for clearance of lease for office space on the 23d floor. During the latter part of August, 1935, Works Progress Administration Districts Nos. 4 and 5 were consolidated and Rankin was placed in charge of the consolidated districts. As a result of the consolidation, it was found that more space would be needed and numerous requests for clearance of lease for additional space were sent to the State office. These requests for clearance of lease occasioned considerable correspondence between the State office and the District office (some of the letters from the District office being signed by Rankin as District Director and some being signed by his assistants). On September 18, 1935, approval for clearance for lease of the 23d floor was obtained by the State Director from the United States Procurement Office. At the time clearance was authorized by the United States Procurement Office the State Director had not advised the Procurement Office of Rankin's relation to and connection with Rankin & Kellogg and the Architects Building Corporation.

6. In November 1935 a lease agreement prepared on United States Government Standard Form covering the 23d floor in the Architects Building was received by the consolidated District office from the State office. This lease agreement was prepared for the signature of the Architects Building Corporation and provided for a rental rate of $1.04 per square foot per annum. The Architects Building Corpora-

tion would not sign the lease since it covered the space on the twenty-third floor which was under lease to Rankin & Kellogg. The Corporation, at a meeting of its Board of Directors on September 4, 1935, had adopted a resolution granting permission to Rankin & Kellogg to sublet the 23d floor to the Works Progress Administration. Accordingly, the lease was changed by crossing out the words "Architects Building Corporation" and substituting therefor "Rankin & Kellogg." The lease was then signed by Rankin for Rankin & Kellogg and witnessed by Miss Anne W. Caley, Rankin's secretary. The lease contained a clause, however, giving the Government option on additional space in the same building when needed and this was beyond the power of Rankin & Kellogg since they controlled the 23d floor only. This lease therefore was never sent to the State Office nor signed by the Works Progress Administration. No lease covering the 23d floor was executed at any time thereafter.

7. About January 1936 it was suggested by the United States Procurement Office that a new requisition for space to house the entire personnel of the Works Progress Administration Philadelphia office be prepared. This was done and bids were advertised for and secured by the State Procurement Office of the United States Treasury Department. Rankin & Kellogg and the Architects Building Corporation did not submit bids, being ineligible in two particulars. Neither had sufficient space available to house the entire Works Progress Administration offices and the Finance Division could not be accommodated on one floor. The lowest bid covered space in the Manufacturers Exchange Building, at 232 North Eleventh Street, Philadelphia, and on February 28, 1936, the consolidated District office was advised that a lease covering such space, effective March 16, 1936, had been executed. After protests by Rankin, the Governor of the State, and others, that the Manufacturers Exchange Building was located in an objectionable neighborhood, the Pennsylvania State Director advised that removal of the Works Progress Administration offices to such building should be postponed. Thereafter, on April 18, 1936, the District offices were moved to the Manufacturers Exchange Building.

8. The Works Progress Administration reported its recommendation with respect to this matter to the General Accounting Office under date of January 4, 1939, in which report it stated that:

> With reference to the possible implication in connection with the Act of March 4, 1909, 35 Stat. 1097, United States Code, Title 18, Section 93, it will be noted that the statute is of a criminal nature and when construed as such, the determination of a violation thereof necessitates a showing of criminal intent on the part of the alleged violator. Documentary evidence attached fails to disclose an intent to defraud on the part of Mr. Rankin; to the contrary, it would appear that he acted in good faith in obtaining office space in order that the District Office of which he was Director, could effectively function in a manner both advantageous and economical to the Federal Government. It is not denied that the employee involved may have technically violated the provisions of the Act of March 4, 1909, nor is it denied that a lease contract was not executed covering the premises, however, it is the opinion of this office that the parties to the transaction acted in good faith and without intention of defrauding the Government.
>
> In view of the above and since the Government occupied and used to its benefit, the premises for which payment is herewith petitioned, the claim is forwarded administratively approved in the amount of $3,233.51.

9. The matter was thereafter submitted to the Comptroller General of the United States. By letter May 18, 1939, the Comptroller General informed plaintiff, in pertinent part, as follows:

> The records submitted to this office for use in connection with this claim indicate that in July 1935 John H. Rankin, a member of your firm, was appointed District Director of the Works Progress Administration, and in such capacity immediately established temporary quarters on the 23rd floor of the above building, which floor was under lease to your firm by the Architects Building Corporation. No formal lease contract was executed by the Government for the premises occupied, although several unsuccessful attempts were made by Mr. Rankin's subordinates to execute such lease for the entire 23rd floor at an annual rental rate of $1.04 per square foot. It appears that Mr. Rankin made the

initial arrangements, establishing the Regional Administrative office of the Works Progress Administration in quarters held by your firm under lease hereinbefore mentioned, and in signed statement, dated February 24, 1937, C. M. Brister, Jr., office manager of Districts Nos. 4 and 5, stated that further negotiations for a lease contract with the United States were conducted either directly by Mr. Rankin or indirectly through employees of his office.

The act of March 4, 1909, 35 Stat. 1097, prohibits any member or agent of any firm or person directly or indirectly interested in the pecuniary profits or contracts from being employed or acting as an officer or agent of the United States for the transaction of business with such firm.

Aside from the terms of said act, it has been repeatedly held that the United States should not, when the needs of the Government reasonably can be otherwise supplied, contract with its officers or employees for the reason that such contracts are against public policy and afford grounds for complaint as to alleged favoritism or fraud in the conduct of the public business. Irrespective of the *bona fide* determination which may have been exercised by Mr. Rankin in arranging for space for the local Works Progress Administration office in quarters held under lease by your firm, the extent and necessity having been determined by Mr. Rankin renders the claim too doubtful for this office to authorize payment of any portion of said amount.

I therefore certify that no balance is found due you from the United States.

10. The Works Progress Administration continuously used and occupied the entire 23rd floor of the Architects Building from July 16, 1935, to April 18, 1936, thereby depriving Rankin & Kellogg of the control, use, and occupancy of the space. The firm of Rankin & Kellogg has fully paid the rental to the Architects Building Corporation at the rate of $1.50 per square foot for the full period of time during which the Works Progress Administration used and occupied said space.

11. The reasonable value of the use and occupancy of the aforesaid space is $1.04 per square foot per annum. The space used and occupied consisted of 4,100 square feet and hence the reasonable value thereof for the period of its use

and occupancy by the Works Progress Administration amounts to $3,233.51. Invoices for the rental of said space were submitted from time to time by plaintiff. The plaintiff has repeatedly demanded payment from the Works Progress Administration, the General Accounting Office, and other agencies of defendant for the aforesaid sum but no part thereof has been paid.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

From the facts in this case, which have been stipulated, it appears that John H. Rankin was appointed Director of the Fourth Pennsylvania District of the Federal Works Progress Administration, a Government agency. At the time of his appointment he was a member of the firm of Rankin & Kellogg, and this firm had under lease certain space on the 23d floor of the Architects Building in the city of Philadelphia, Pa., for which it had agreed to pay $1.50 a square foot per annum. The firm consisted of three members, one of whom died the day before Rankin's appointment as Director of the Fourth Pennsylvania District, and the other within six months thereafter. The space occupied by this firm was adequately fitted up for the business of architects, but, due to the depression in business generally which was prevailing at that time, was not necessary for the business of the firm.

Rankin was authorized by the State Director of the Works Progress Administration to procure adequate office space. He placed the office of the Fourth Pennsylvania District in his firm's offices, and then asked for bids for office space. The corporation which owned the building in which the firm of Rankin & Kellogg leased space, and of which plaintiff was President and a member of the Board of Directors, offered space in the same building at $1.04 a square foot. Rankin did not accept this offer, but recommended the space occupied by his firm to the Procurement Division of the Treasury at the same rate per square foot as that made by the corporation which owned the building. He failed

to notify the Procurement Division of the Treasury, through whom all leases were made, that the space recommended by him was under lease to his firm. The Procurement Division prepared a lease with the corporation as lessor, but when this lease was presented to the corporation to sign, it refused on the ground the space was then under lease to Rankin & Kellogg. No lease was ever executed for this space by the Works Progress Administration, but Rankin kept the offices of the Fourth Pennsylvania District in the space under lease to his firm until removal of the office of the Works Progress Administration from the building on April 18, 1936. He is suing as sole surviving and liquidating member of the partnership firm of Rankin & Kellogg for the reasonable rental value of the space so occupied and used by the offices of the Director of the Fourth Pennsylvania District of the Works Progress Administration. No payment has ever been made by the Government for the space so occupied and this action is brought to recover the sum of $3,233.51.

Section 93, Title 18, U. S. Code (Criminal Code, Section 41, 35 Stat. 1097), reads as follows:

> No officer or agent of any corporation, joint-stock company, or association, and no member or agent of any firm, or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, shall be employed or shall act as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. Whoever shall violate the provision of this section shall be fined not more than $2,000 and imprisoned not more than two years.

It is clear from the recited facts that Rankin was not only a member of a firm but also a person directly interested in the pecuniary profits and contracts of such firm. He also acted "as an officer or agent of the United States for the transaction of business with such * * * firm." Although plaintiff was an officer of the Works Progress Administration in charge of a District he insisted upon the use of his firm's offices after procuring bids on space for the permanent quarters of his Division, and after receiving from the

Architects Building Corporation the lowest bid. Nevertheless he retained and occupied the space leased by his firm from the Architects Building Corporation, of which he was President, a member of the Board of Directors, and in which corporation his partnership held stock.

The partnership of Rankin & Kellogg did not enter a bid when Rankin as Director secured bids on space for quarters. He may have explained to the State Director, from whom his appointment had come, his connection with the Architects Building Corporation and his desire to have the Fourth Division in the partnership offices, but none of these relationships were ever divulged to the Procurement Division of the Treasury. It is transparent that Rankin violated the provisions of the statute. He did not take merely a perfunctory part but was the prime mover to secure and retain the space rented to his partnership as the offices for the Works Agency, of which he was Director. Insistence is not perfunctory, it is demanding and urgent, and that was his attitude when other space could have been secured from the Corporation of which he was President and that owned the building. He recommended against removal to another building in April but nevertheless the offices were removed. The assumption is not violent that with the architect business not active due to the depression and by subletting the space, the partnership would save $1.04 a square foot per annum, thus mitigating the loss on the lease which it had made with the Architects Building Corporation and which had some time to run before expiration.

The contention is made that although the penal statute has been violated by Rankin, nevertheless recovery should be had because the Government has occupied the space and impliedly should pay a reasonable compensation for its use. The question therefore arises, is such an implied contract enforceable? The general rule which the Supreme Court and this Court have consistently followed is that laid down in *Clark* v. *United States*, 95 U. S. 539. A parol contract fully executed by the contractor upon his part wherein the United States receives all the benefits of the undertaking imposes a liability upon the latter as upon an implied con-

tract. However, the plaintiff, a public officer, has violated a penal statute by using or attempting to use his office for his own pecuniary benefit. The rule in such cases is that an act done in violation of the statutory prohibition is void and confers no rights upon the wrongdoer. It would be strange indeed to allow the plaintiff to recover a reasonable rental value for the space controlled by him when the statute makes it a crime punishable by fine and imprisonment for him to act for the Government and deal with himself. *Prosser* v. *Finn*, 208 U. S. 67; *Waskey* v. *Hammer*, 223 U. S. 85; *Ewert* v. *Bluejacket*, 259 U. S. 129.

The plaintiff could not recover on an express contract, so it is equally fatal to the theory of recovery on an implied contract, notwithstanding any benefit which may have accrued to the Government. *Beach* v. *United States*, 226 U. S. 243, 260; *Vlachos* v. *United States*, 90 C. Cls. 165; *The Curved Electrotype Plate Co.* v. *United States*, 50 C. Cls. 258.

In *Michigan Steel Box Co.* v. *United States*, 49 C. Cls. 421–439, this Court said:

> The reason of the rule inhibiting a party who occupies confidential and fiduciary relations toward another from assuming antagonistic positions to his principal in matters involving the subject matter of the trust is sometimes said to rest in a sound public policy, but it also is justified in a recognition of the authoritative declaration that no man can serve two masters; and considering that human nature must be dealt with, the rule does not stop with actual violations of such trust relations, but includes within its purpose the removal of any temptation to violate them. Hence the principal, on being informed of the participation of his agent on his own account and interest in a transaction wherein there was an obligation to represent the principal, may disaffirm the contract so entered into without reference to any actual damage to the principal or benefit to the agent.

The plaintiff cannot recover. The petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

ARCHITECTS BUILDING CORPORATION, A CORPORATION v. THE UNITED STATES

[No. 45199. Decided February 1, 1943]

On the Proofs

Rental of space by Government; exception to rule that an act done in violation of statutory prohibition is void.—The rule that an act done in violation of a statutory prohibition is void and no right accrues to the wrongdoer is subject to qualifications. One of the exceptions is where the act is purely ministerial and not within the spirit and purpose of the penal statute, if the violator of the statute derives no benefit and his actions do not transgress public policy.

The Reporter's statement of the case:

Mr. Paul F. Myers for the plaintiff. *Mr. Yale L. Schekter* was on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is and at all times pertinent to this case was a Pennsylvania corporation engaged in the rental of office space in the Architects Building located at Seventeenth Street at Sanson, Philadelphia, Pennsylvania.

2. On or about July 9, 1935, John H. Rankin was appointed Director of the Fourth Pennsylvania District by the duly authorized Pennsylvania State Director of the Federal Works Progress Administration. The State Director instructed Rankin to return at once to Philadelphia and establish the Works Progress Administration offices for the Fourth Pennsylvania District. In accordance with his instructions Rankin at once organized a Works Progress Administration staff, setting up temporary quarters in the offices of his partnership firm of Rankin & Kellogg and immediately notified the State Director of this fact. On July 16, 1935, the Fourth District of the Works Progress Administration entered into the actual possession and use of the 23rd floor of the Architects Building, which building

was thoroughly modern and centrally located, and was suitable to the Works Progress Administration. At the time the entire 23rd floor was under lease to Rankin & Kellogg. About the same time Rankin fully disclosed to the Pennsylvania State Director and his deputy all the facts with respect to his individual relationship to the plaintiff corporation, his membership in the firm of Rankin & Kellogg, the firm's lease of the 23rd floor of the Architects Building, and the firm's ownership of stock in the plaintiff corporation.

3. During the latter part of August 1935, the Fourth Pennsylvania District and the Fifth Pennsylvania District of the Works Progress Administration were consolidated and Rankin was placed in charge of the consolidated districts. The consolidation resulted in a need for additional space. Thereafter the Works Progress Administration, through the offices of its District Director, entered into negotiations with the plaintiff for the rental of 6,387 square feet of additional space on other floors in the Architects Building at a rental rate of $1.04 per square foot per annum (including light, heat, water, power, and elevator service). A Mr. Brister, the rental agent for the District Director's office, together with a Mr. Heagy, the rental agent for the State Director's office, and Mr. Jones, the State Director, personally negotiated with a Mr. Greenberg, the rental agent of the Architects Building Corporation, for the additional space needed by the Works Progress Administration. This was done about two or three weeks prior to September 10, 1935. Greenberg knew that Rankin as District Director was Brister's superior but did not discuss with Rankin the negotiations for rental of space except in a casual and informal manner.

4. The rental agent of the Architects Building Corporation looked with dissatisfaction on having the Works Progress Administration continue in the building and hoped it (the Works Progress Administration) would soon remove from the building. The Architects Building is a specialty building and rents space only to architects and persons affiliated with the building trades. The work done by the Works Progress Administration and the people receiving assistance therefrom were of a character unsuited to plaintiff's type of

specialty building. The Architects Building was approximately 93 percent rented at the time in question and the space occupied by the Works Progress Administration could have been rented without difficulty at a rental rate of $1.04 per square foot. The previous tenant for the additional space occupied by the Works Progress Administration had paid $3.00 per square foot. The plaintiff corporation has never offered a rental rate as low as $1.04 per square foot. Upon stating these objections the rental agent of the plaintiff corporation was advised by the State Director that it was the plaintiff's patriotic duty to assist in the administration of the Works Progress Administration and the rental agent decided to submit the bid on that basis. Rankin took no part in making up the bid of the plaintiff corporation.

5. As a result of negotiations with the plaintiff the Works Progress Administration, on September 10, 1935, entered into the possession and use of the necessary 6,387 square feet of additional space in the plaintiff's building. From time to time thereafter the Works Progress Administration entered into the use and occupancy of still additional space in the building, and by the middle of January 1936 had increased its use and occupancy of additional space in the building to a total of 9,713 square feet. All of the aforesaid space was negotiated for and occupied by the Works Progress Administration with the knowledge and approval of the office of the Pennsylvania State Director of the Works Progress Administration.

6. It was ascertained by bidding that the rental rate of $1.04 per square foot was as low a price as then prevailed for similar office space. The bid of the Architects Building Corporation was the lowest of six. With respect to the aforesaid additional space, requests for clearance of lease for such space were sent to the office of the Pennsylvania State Director of the Works Progress Administration as additional space was acquired and there was considerable correspondence with respect thereto between the State Office and the District Office. On September 18, 1935, approval for clearance for lease of the space then occupied by the Works Progress Administration was obtained by the State Director from the United

States Procurement Office. In November 1935 a lease agreement prepared on United States Government Standard Form covering space in the Architects Building was received by the consolidated District Office from the State Office. This lease agreement, prepared for the signature of the Architects Building Corporation and providing for a rental rate of $1.04 per square foot per annum, covered the entire 23rd floor of the Architects Building, with the Government having the right to extend the terms of the lease to approximately 6,387 square feet of additional space in the Building. The Architects Building Corporation declined to sign the lease since it included the space on the 23rd floor which was then under lease to Rankin & Kellogg. Subsequently approval for clearance for lease for other additional space was obtained by the Works Progress Administration. At the time the first and subsequent clearances were authorized by the United States Procurement Office, the State Director of the Works Progress Administration had not advised the Procurement Office of Rankin's relationship to and connection with Rankin & Kellogg and the Architects Building Corporation.

7. About January 1936 it was suggested by the United States Procurement Office that a new requisition for space to house the entire personnel of the Works Progress Administration Philadelphia office be prepared. This was done and bids were advertised for and secured by the State Procurement Office of the United States Treasury Department. The Architects Building Corporation did not submit a bid, being ineligible in two particulars: It did not have sufficient space available to house the entire Works Progress Administration offices and the Finance Division could not be accommodated on one floor. The lowest bid covered space in the Manufacturers Exchange Building at 232 North Eleventh Street, Philadelphia, and on February 28, 1936, the consolidated District office was advised that a lease covering such space, effective March 16, 1936, had been executed. After protests by Rankin, the Governor of the State, and others, that the Manufacturers Exchange Building was located in an objectionable neighborhood, the Pennsylvania State Director advised that removal of the Works Progress Administration

offices to such building should be postponed. Thereafter, on April 18, 1936, all the space in the Architects Building used and occupied by the Works Progress Administration, except approximately 1,820 square feet occupied by the National Youth Administration, was vacated and removal of the offices to the Manufacturers Exchange Building was effected.

8. The National Youth Administration continued to use and occupy 1,820 square feet of space in the plaintiff's building from April 19, 1936, until August 31, 1936, on which date it removed from the Architects Building to the Manufacturers Exchange Building. Thereafter, on October 26, 1936, the Pennsylvania State procurement officer for defendant executed a lease for the space occupied by the National Youth Administration from April 19, to August 31, 1936, at a rental price of $688.75, based on the rate of $1.04 per square foot per annum, but payment was not made thereunder. No lease was at any time executed with respect to the other space used and occupied by the Works Progress Administration. The rental agent of the Architects Building Corporation negotiated directly with Judge Isaac Sutton, the State Director of the National Youth Administration, for all the space used and occupied by the Youth Administration. The rental agent thought the National Youth Administration and the Works Progress Administration were independent organizations, and did not discuss with Rankin the negotiations for the space used and occupied by the National Youth Administration.

9. John H. Rankin, the District Director of the Works Progress Administration, was president of the plaintiff corporation and a member of its board of directors at the time the Works Progress Administration entered into negotiations with the plaintiff for the lease of space in its building, and during the period of occupancy here in question. This fact was known to the rental agent of the plaintiff. Rankin received no salary or compensation for acting as president and director of the plaintiff corporation nor emoluments in any form. He was a member of the firm of Rankin & Kellogg which owned 309 shares of stock in the plaintiff corporation out of a total issue of 5,000 shares. That stock has never paid any dividends as there have been no assets out of which a

dividend could be declared. The 309 shares held by Rankin & Kellogg were appraised in 1936 at $1.00 for the lot in an appraisal of the estate of one of the partners. The last known sale during the period here in question was a block of 750 shares which sold in or about 1934 for $75.00 for the lot.

10. Rankin's duties as president and director of the plaintiff corporation were for the most part nominal in character. His duty as president was to preside at meetings of the board of directors. He had nothing to do with the running of the building. The leases made by the Architects Building Corporation were, in every instance, negotiated by Joseph J. & Reynold H. Greenberg, Inc., as rental agents; neither Rankin nor any other officer of the company took any part in the negotiations; but after the written lease was signed by these rental agents, it was the practice to have either the president or secretary of the corporation formally approve the lease in writing, and Rankin undoubtedly signed some of the leases in this manner during his term of office as president. As District Director of the Works Progress Administration, Rankin participated, in part directly and in part through his subordinates, in the Government's negotiations for the obtaining of space in the Architects Building.

11. The plaintiff corporation followed this procedure in reaching its decision to lease space to the Works Progress Administration: Upon completion of his negotiations with the officials of the Works Progress Administration, the rental agent of the Architects Building Corporation submitted the proposition to the rental committee of the board of directors of the corporation. The committee, composed of three men of which the rental agent was one, voted to approve the leasing of space to the Works Progress Administration. One member of the committee voted to disapprove. The two majority members voted for approval on the ground that it was the corporation's patriotic duty. Rankin was not a member of this rental committee. The matter was then submitted to the board of directors which likewise approved the leasing. The board consisted of seven members, one of whom was Rankin. Rankin's vote as a director was not necessary to secure a majority vote of the board of directors for

the approval of the lease and the record does not show whether he was present at the meeting when the lease was approved. It was the uniform practice of the board of directors to approve the recommendations made by its rental committee.

12. The Works Progress Administration reported its recommendation with respect to this matter to the United States Treasury Department in a letter dated April 30, 1937, in which it is stated that:

> A review of the factual evidence at hand does not disclose that there has been established an intent to defraud on the part of John Rankin, and it would appear that this employee acted in good faith in an effort to obtain space facilities for the activities of this Administration in a manner which would be to the greatest advantage and economy to the Government. There is further no evidence indicating that Rankin profited either directly or indirectly from the transaction in question.
>
> In view of the foregoing, and notwithstanding that there may have been a technical violation of the provisions of the Act of March 4, 1909, on the part of the District Director, and notwithstanding further that there was no lease agreement covering occupancy of the space in question legally binding the Government, it is the opinion of this office that since all parties to the transaction apparently acted in good faith and without fraudulent intent, and since the Government did have use and occupy the aforementioned space for the period covered in claim presented by the Architects Building Corporation, the instant claim should be submitted to the General Accounting Office for consideration and final settlement, and is returned herewith for that purpose with administrative approval of payment.

13. The matter was thereafter submitted to the Comptroller General of the United States. By letter dated May 18, 1939, the Comptroller General informed plaintiff, in pertinent part, as follows:

> The record submitted to this office for use in connection with this claim indicates that in July 1935 temporary administrative quarters for the local Works Progress Administration staff were established on the 23rd floor of your building, which floor was under lease to

the partnership firm of Rankin and Kellogg. During the following September, and at various times thereafter additional space on other floors was obtained from you in order to accommodate increases of administrative personnel including that of the National Youth Administration. The occupancy of this additional space throughout the building at an annual rental rate of $1.04 per square foot constitutes the basis for your claim.

The record shows that no formal lease contract covering the occupied space was executed by a Government official duly empowered to obligate the United States for the payment of rent therefor until after the premises had been vacated. It appears that such space had been arranged for, either directly or indirectly, by John H. Rankin, district director of the Works Progress Administration who also, either directly or through subordinate employee of this office, conducted the negotiations for leasing the involved space. During these negotiations Mr. Rankin was president of the Architects Building Corporation and also a member of the partnership firm of Rankin and Kellogg which firm was a stockholder of said corporation.

The Act of March 4, 1909, 35 Stat. 1097, prohibits any officer or agent of any corporation, joint-stock company, or association, or any member or agent of any firm or person directly or indirectly interested in the pecuniary profits or contracts of such corporation, joint-stock company, association, or firm, being employed or acting as an officer or agent of the United States for the transaction of business with such corporation, etc.

Aside from the prohibition contained in said statutes, the action of Mr. Rankin in acting as agent of the Government in arranging for space in the building was against public policy, affording grounds for complaint as to alleged favoritism, fraud, etc., in the conduct of the public business, thus rendering the present claim too doubtful for this office to authorize payment of any portion of said amount from appropriated funds.

I therefore certify that no balance is found due you from the United States.

14. The reasonable value of the occupancy and use of the aforesaid space in plaintiff's premises by defendant is at the rate of $1.04 per square foot per annum. The amount of space occupied, the time occupied, and the reasonable value thereof are as follows:

Works Progress Administration

Period			
9/10/35- 9/30/35—6,387 sq. ft	$369.03		
9/25/35- 9/30/35—1,033 " "	14.92		
		$383.95	
10/1/35-10/31/35—7,595 " "	658.23		
10/15 -10/31/35— 431 " "	18,51		
		676.74	
11/1/35-11/30/35—8,599 " "	745.25		
11/6/35-11/30/35— 658 " "	47.50		
		792.75	
12/1/35-12/31/35—9,257 " "		802.27	
1/1/36 - 1/31/36—9,257 " "	802.27		
1/13/36- 1/31/36— 456 " "	26.34		
		828.61	
2/1/36 - 2/28/36—9.713 " "		841.79	
3/1/36 - 3/31/36—9,713 " "		841.79	
4/1/36 - 4/18/36—9,713 " "		505.07	
Total			$5,672.97

National Youth Administration

The space used and occupied by the National Youth Administration from April 19, 1936, to August 31, 1936, consisted of 1,820 square feet and hence the reasonable value thereof for the period of its use and occupancy by the National Youth Administration amounts to	$688.75
Grand total	6,361.72

Invoices for the rental of the aforesaid space were submitted from time to time by plaintiff. The plaintiff has repeatedly demanded payment from the Works Progress Administration, the General Accounting Office, and other agencies of defendant for the above rentals but no part thereof has been paid.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Plaintiff is seeking to recover the rental value of certain spaces in the building owned by it and which spaces were used and occupied by a section of the Works Progress Administration and by the National Youth Administration.

The Fourth Pennsylvania District of the Federal Works Progress Administration had been located by the Director of that district on the twenty-third floor of the Architects Building in the city of Philadelphia. This space was under lease to the firm of Rankin & Kellogg. In the latter part of

August, 1935, the Fifth Pennsylvania District of the Works Progress Administration was consolidated with the Fourth Pennsylvania District and, as a result of this consolidation, additional space was necessary to accommodate the Fifth District in the same building in which the Fourth District was located.

The Works Progress Administration, through the office of its District Director negotiated for the additional space. The rental agent for the District Director's office and the rental agent for the State Director's office negotiated with the rental agent of the Architects Building Corporation for the additional space. The rental agent for the Architects Building knew that the Director of the Fourth Pennsylvania District was the superior of the rental agent of the District Director's Office but no discussion was had with the Director about the rental of the space.

The Director of the Fourth District, Rankin, was the President of the Architects Building Corporation which owned the building; he was a member of its Board of Directors and a stockholder through his copartnership holdings. However, he took no part in submitting the bid for space in the building. There were five other bids but the offer of the Architects Building Corporation at $1.04 per square foot was the lowest. As a result of the negotiations the Works Progress Administration on September 10, 1935 entered into possession and used 6,387 square feet of space in addition to the twenty-third floor which was then leased to Rankin & Kellogg. Clearance was obtained by the State Director of the United States Procurement Office for the space occupied by the Works Progress Administration and subsequently the lease agreement was prepared on a United States Government Standard Form covering the entire space in the Architects Building including the twenty-third floor. The Architects Building Corporation declined to sign this lease because it included the twenty-third floor which space was then under lease to Rankin & Kellogg.

Subsequently it was decided to move the offices of the Works Progress Administration to the Manufacturers Exchange Building and on April 18, 1936, the space in

the Architects Building occupied by the Works Progress Administration was vacated except the 1,820 square feet which was occupied and used by the National Youth Administration. This space was used by the National Youth Administration from April 19, 1936 until August 31, 1936, on which date it was vacated. On October 26, 1936, the Pennsylvania State procurement officer executed a lease for the space occupied by the National Youth Administration from April 19, 1936, to August 31, 1936, at a rental price of $688.75. This was the only lease that was ever executed by the Works Progress Administration for the space occupied by it in the plaintiff's building.

The negotiations for the lease were conducted by the State Director of the National Youth Administration. Rankin, in his official position as President of the Corporation, or as Director of the Fourth District of the Works Progress Administration, had nothing to do with the negotiations and the entering into of the lease. The defendant never paid anything for the additional space occupied by the Works Progress Administration or for the space occupied by the National Youth Administration, and this suit is brought to recover the reasonable value for the occupancy of this additional space necessary to accommodate the Works Progress Administration and the National Youth Administration.

The defendant has received the benefit of the use of plaintiff's property and under ordinary circumstances should pay for it. The general rule is, and has been consistently followed since *Clark* v. *United States*, 95 U. S. 539, 543, that where a parol contract has been fully executed by a contractor, wherein the United States receives all the benefits of the undertaking, the contractor is entitled to recover such value as upon an implied contract.

The defendant sets up the defense that plaintiff is not entitled to recover for the reason that Rankin, who was the Director of the Fourth and Fifth Consolidated Pennsylvania Districts of the Works Progress Administration, was also President of the Architects Building Corporation and a member of the Board of Directors and his firm was a stockholder

in the corporation, and, therefore, the act of March 4, 1909, 35 Stat. 1097, Title 18, Ch. 4, Sec. 93, U. S. C. A. applies.

This statute makes it a criminal offense, subject to fine and imprisonment, for any officer of a corporation or member or agent of a firm, directly or indirectly interested in the pecuniary profits of the corporation or firm, to act as an officer or agent of the United States in the transaction of any business with such corporation or firm. As this is a prohibitive statute no contractual rights can accrue through the act of an officer of a corporation or firm who also acts for the United States.

The instant case is different in many respects from the case of *John H. Rankin, Sole Surviving and Liquidating Member of the Partnership Firm of Rankin & Kellogg* v. *The United States*, No. 45200, decided this date, *ante*, p. 357 in which we held that it was unlawful for an officer of the Government to act with himself and therefore no contractual right could accrue.

The negotiations in the instant case for the additional space were conducted by the rental agent of the Director's Office and the rental agent of the Architects Building Corporation. Rankin had nothing to do with these negotiations. The only connection he might have had with the matter was the signing of a lease as President of the Corporation or the confirmation of a lease by the Board of Directors of which he was only one member, if a lease had been executed. No lease was executed. His connection was so slight and minor that we do not think the interests of the Government could in any way have been affected.

The rental price was fair and reasonable. The space was necessary to accommodate the consolidated districts and the mere fact that the Director of the Districts happened to be the President of the Corporation and a member of its Board of Directors should not, and does not, we think, preclude recovery. Rankin received no pecuniary benefit and derived no advantage either directly or indirectly.

This case is controlled by the case of *United States* v. *Chemical Foundation*, 272 U. S. 1, 18, in which the Supreme Court held, in commenting upon the effect of section 41 of the Criminal Code, as follows:

> * * * It lays down a general rule for the protection of the United States in transactions between it and corporations and to prevent its action from being influenced by anyone interested adversely to it. It is a penal statute and is not to be extended to cases not clearly within its terms or to those exceptional to its spirit and purpose. * * *

We believe this is one of the exceptions to the general rule. It was not the intention of the statute to cover a case of the nature of the instant case where the action of the President of the Corporation, who happened to be an agent of the Government, was solely for the purpose of officially signing the lease or voting on its acceptance, and where he took no part in the negotiations and derived no benefit, his actions being purely ministerial and in no way detrimental to the interests of the United States and transcended no public policy.

The additional space occupied by the National Youth Administration from April 19, 1936, to August 31, 1936, was signally free from any possible taint or color of undue influence, and plaintiff is entitled to recover for the use of this space.

In our judgment, plaintiff is entitled to recover for the entire additional space in the Architects Building which was occupied by the Works Progress Administration from September 10, 1935, to April 18, 1936, in the sum of $5,672.97, and for the space occupied by the National Youth Administration from April 19, 1936, to August 31, 1936, in the sum of $688.75.

Plaintiff is entitled to recover $6,361.72.

It is so ordered.

JONES, *Judge;* and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, dissenting in part and concurring in part:

I am unable to agree with the conclusion reached by the majority. The majority opinion distinguishes this case from *Rankin* v. *United States*, No. 45200, this day decided, because in the *Rankin* case the plaintiff himself negotiated the arrangement whereby the Works Progress Administration occupied space under lease to his firm of Rankin & Kellogg, and in the case at bar the lease was negotiated

by the rental agent of the building and the rental agent of the local office of Works Progress Administration. However, the rental agent of the building of course acted under the supervision and control of the plaintiff as the President of the Architects Building Corporation, and the rental agent of the Works Progress Administration acted under his supervision and control as the State Director of the Works Progress Administration. In the one case he acted himself, and in the other through his agents. *Qui facit per alium, facit per se.*

This was a transaction forbidden, I think, by section 93, Title 18, U. S. Code. Not to so hold would permit the easiest sort of evasion of this statute. All an officer of a corporation would have to do would be to tell some one of his subordinates to negotiate a lease with him as an officer of the United States, or with one of his agents acting under his control as an officer of the United States.

Plaintiff's president certainly knew of the negotiation of the lease by his building agent with his Works Progress Administration agent. Such conduct, I think, is forbidden by the statute and, therefore, plaintiff is not entitled to recover for the space occupied by the Works Progress Administration. I think it is entitled to recover for the space occupied by the National Youth Administration, and to this extent I concur in the majority opinion.

MADDEN, *Judge*, concurs in this opinion.

JOHN J. McCLURE v. THE UNITED STATES

[No. 45240. Decided February 1, 1943]

On the Proofs

Internal revenue tax; importation of distilled spirits; statute of limitation; fraud; validity of assessment by Commissioner.—Where the Commissioner of Internal Revenue on the September 1938 Supplemental List, under the Revenue Act of 1926 (44 Stat. 9, 104) and the National Prohibition Act (41 Stat. 305, 317), assessed against plaintiff certain internal revenue taxes on distilled spirits alleged to have been imported by plaintiff during the period from March 1929 to January 1931 and on October 29, 1930, and November 12,

Syllabus

1930; and where, after notice of assessment and demand for payment, said taxes were paid under protest by plaintiff on November 28, 1938, and a claim for refund, later amended, was filed by plaintiff, alleging that the claimant had not imported the distilled spirits as charged and alleging further that the assessment had been made after the liability for said taxes had been barred by the statute of limitation; and where such claim for refund was rejected by the Commissioner; it is *held* upon the evidence adduced that said distilled spirits were imported as alleged, that such importation was with intent to defraud the Government of the lawful revenue due, and plaintiff is not entitled to recover.

Same; statue of limitation; fraudulent intent to evade taxes.—Where there has been a fraudulent attempt to evade the payment of tax, and where assessment was made under a charge of fraud; the statute of limitation (Revenue Act of 1926, section 1109, as amended by the Revenue Act of 1928, section 619 (a)) is not applicable.

Same; presumption in favor of findings and assessment by Commissioner.—A tax assessment made by the Commissioner of Internal Revenue is presumed to be correct and the facts found by the Commissioner to support the assessment are presumed to be correct. *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361, and other cases cited.

Same; fraud not presumed.—Fraud will not be presumed. *Vitelli* v. *United States*, 250 U. S. 355, and other cases cited.

Same; fraud established by proper inference from facts proven.—It is the duty of the court to draw from the facts proven all reasonable inferences, and where no reasonable inferences can be drawn from the facts found or admitted other than that fraud has been committed or attempted, fraud is sufficiently established. *Tucker* v. *Moreland*, 10 Peters (U. S.) 57, 78, cited.

Same; allegations of refund claim not evidence unless supported by testimony.—Where plaintiff's claim for refund was admitted in evidence by stipulation of the parties; and where thereafter plaintiff took the witness stand but was not asked to reaffirm the statements made in his claim, and did not reaffirm such statements; and where plaintiff did not in any other way testify whether or not he had imported the distilled spirits in question, as alleged by the Commissioner of Internal Revenue; it is *held* that under such circumstances the allegations of the claim for refund cannot be considered as evidence of the facts therein recited.

Same.—Where defendant's attorney did not make it plain that he was agreeing to the receipt in evidence of plaintiff's claim for refund only as proof that such claim had been filed and not as evidence of the facts therein alleged; it is not to be implied that he agreed that such allegations might be treated as evidence, since the plaintiff who had made the allegations was in court ready to testify.

Same; intent to defraud shown from facts proven.—Where it is established that distilled spirits were imported, and where for seven years no report of such importation was made; and where during such period no tax under the applicable internal revenue statute was paid, and such tax was not paid until after assessment by the Commissioner of Internal Revenue and demand for payment; it is *held* that the only reasonable inference is that there was intent to defraud the Government of revenue.

Same; counterclaim; tax on diversion.—Where the Commissioner made an assessment upon a finding that distilled spirits had been imported without payment of the tax due; and where the Commissioner also found that the distilled spirits had been diverted for beverage purposes but did not assess the tax on diversion; and where there is no other proof of diversion; it is *held* that the defendant is not entitled to recover from plaintiff the amount of the diversion tax, the allegations of defendant's counterclaim not having been sufficiently proven.

The Reporter's statement of the case:

Mr. J. H. Ward Hinkson for the plaintiff.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Chester, Pennsylvania.

2. On his September 1938 Supplemental List, the Commissioner of Internal Revenue assessed against the plaintiff the sum of $62,808.90 covering the tax on 57,099 gallons of distilled spirits which the Commissioner determined plaintiff had imported into the United States and diverted to beverage purposes during the period March 1929 to January 1931.

On the same list the Commissioner made a further assessment against plaintiff in the sum of $14,190, covering the tax on 12,900 gallons of distilled spirits which the Commissioner determined plaintiff had imported into the United States and diverted to beverage purposes on October 29, 1930, and November 12, 1930.

The tax assessed was at the rate payable for any importation and not at the rate payable where there was an importation and diversion for beverage purposes.

Each of the above assessments was made under a charge of fraud.

3. On or about November 8, 1938, the Collector of Internal Revenue made written demand upon the plaintiff for the payment within ten days of the taxes which had been assessed as set out in the preceding finding. In compliance with that demand, plaintiff made payment of the total amount of $76,998.90 to the Collector on November 18, 1938. The payment was accompanied by a letter of protest and by a claim for refund on Treasury Form No. 843. The claim was amended on December 5, 1938, and December 13, 1938. As finally amended, the claim set out the following basis therefor:

> The deponent did not at any time import or divert the distilled spirits upon which the above-mentioned tax appears to have been assessed, or any part thereof, either directly or indirectly; nor did he at any time manufacture, produce, possess, own, or control the said distilled spirits, or any part thereof. He has neither fraudulently nor willfully failed to make a return or pay a tax in connection with the importation of such distilled spirits at any time. The deponent is altogether ignorant of the circumstances and reasons under which or on account of which the said tax was assessed, and has paid the same under duress to forestall a levy and distraint upon his property.
>
> Moreover, the deponent is advised and believes that no authority is vested in the Collector of Internal Revenue to collect the internal revenue tax imposed by law upon distilled spirits imported into the United States.
>
> Even though a tax had been due by the deponent on account of the importation of distilled spirits within either of the periods above mentioned, the legal assessment and collection of such tax as effected in the instant case would have been barred by the statute of limitations.
>
> The deponent respectfully requests that he be furnished with a statement of the facts which gave rise to the assessment of the above-mentioned tax, and that he be afforded an opportunity to confer with the Commis-

sioner with respect thereto before this claim for refund is finally passed upon.

The Commissioner rejected plaintiff's claim October 23, 1940.

4. On the hearing before a commissioner of this court the parties stipulated and agreed as follows:

> Fourth, that the payment as aforesaid was accompanied by a letter of protest and by claim for refund on Form 843.
>
> Fifth, that amended claims for refund of the tax so paid were thereafter filed with the Collector of Internal Revenue on December 5, 1938 and on December 13, 1938, respectively.
>
> Sixth, that the finally amended claim for refund as filed on December 13, 1938, may be received in evidence.
>
> And I submit a copy of the claim for refund as so finally amended and filed and ask that the same be received in evidence as Plaintiff's exhibit 2.
>
> The COMMISSIONER: It will be received.
>
> (Copy of claim for refund, as amended, so offered and received in evidence, was marked Plaintiff's exhibit No. 2 and made a part of this record.)
>
> * * * * *
>
> In plaintiff's exhibit A, which constitutes two forms of notice and demand from the Collector of Internal Revenue upon the plaintiff, which I believe were offered as plaintiff's exhibit No. 1, in the lower right-hand corner of exhibit A there appears in typewriting the following:
>
> > "Tax on 57,099 Gals. DS. Imported & Dvt, March–1929–to Jan–1931 (Fraud)"
>
> Counsel agree and stipulate that that notation refers to the assessment made by the Commissioner in September 1938 and refers to an assessment of tax on 57,099 gallons of distilled spirits imported and diverted, between the period March 1929 to January 1931 and that the assessment was made under a charge of fraud.
>
> The notation on the notice and demand marked Exhibit B, which is included in plaintiff's exhibit No. 1, in the lower right-hand corner, reads:
>
> > "Tax on 12,900 Gals. DS Imported & Dvt. 10/20–30 & 11/12–30 (Fraud)."
>
> Counsel agree and stipulate that that notation means that the tax which was assessed in September 1938 was

a tax on 12,900 gallons of distilled spirits imported and diverted on October 29, 1930, and November 12, 1930, and that the assessment was made on a fraud charge.

* * * * *

We are simply agreeing that the assessments, of which there were two, were made on the Commissioner's determination that the gallonage referred to was imported and diverted in the period or on the dates shown.

* * * * *

During the period from March 1929 to January 1931 the plaintiff imported 57,099 gallons of distilled spirits, and on October 29, 1930, and on November 12, 1930, the plaintiff imported 12,900 gallons of distilled spirits. The plaintiff did not report these importations and did not pay the tax thereon. The proof is not sufficient to find that the plaintiff diverted the distilled spirits for beverage purposes.

5. There has been no assignment or transfer of the claim covered by this suit or any part thereof.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover $76,998.90 internal-revenue taxes on distilled spirits alleged to have been imported between March 1929 and January 1931, and interest thereon. These taxes were assessed by the Commissioner of Internal Revenue on the September 1938 Supplemental List. Notice of the assessment and demand for the payment of the tax was served on the plaintiff on November 8, 1938. The taxes were paid under protest on November 18, 1938. Claim for refund accompanied the payment. This claim, as amended, was based upon the allegation that the claimant had not imported the distilled spirits as alleged and, further, that the assessment had been made after liability for the taxes had been barred by the statute of limitations. The claim was rejected on October 23, 1940, after this suit had been filed on September 5, 1940.

At the hearing before a commissioner of this court the parties stipulated all the foregoing facts. The plaintiff took

the stand and testified only that he had not made an assignment of the claim. He was not cross-examined.

The parties then further stipulated as follows:

> In plaintiff's exhibit A, which constitutes two forms of notice and demand from the Collector of Internal Revenue upon the plaintiff, which I believe were offered as plaintiff's exhibit No. 1, in the lower right-hand corner of exhibit A, there appears in typewriting the following:
>
> "Tax on 57,099 Gals. DS. Imported & Dvt, March 1929–to Jan. 1931 (Fraud))."
>
> Counsel agree and stipulate that that notation refers to the assessment made by the Commissioner in September 1938 and refers to an assessment of tax on 57,099 gallons of distilled spirits imported and diverted, between the period March 1929 to January 1931, and that the assessment was made under a charge of fraud.
>
> The notation on the notice and demand marked Exhibit B, which is included in plaintiff's exhibit No. 1, in the lower right-hand corner, reads:
>
> "Tax on 12,900 Gals. DS Imported & Dvt. 10/20–30 & 11/12/–30 (Fraud)."
>
> Counsel agree and stipulate that that notation means that the tax which was assessed in September 1938, was a tax on 12,900 gallons of distilled spirits imported and diverted on October 29, 1930, and November 12, 1930, and that the assessment was made on a fraud charge.
>
> * * * * *
>
> We are simply agreeing that the assesments, of which there were two, were made on the Commissioner's determination that the gallonage referred to was imported and diverted in the period or on the dates shown.
>
> * * * * *

Whereupon both parties closed their proof.

The plaintiff says he is entitled to recover because the assessment was made, admittedly, after liability for the taxes had been barred by the statute of limitations. (Sec. 1109 (a) Rev. Act of 1926, as amended by Sec. 619 (a) Rev. Act of 1928, 45 Stat. 791, 878; Int. Rev. Code, sec. 3312.) The defendant replies that the statute of limitations does not apply where there has been a fraudulent attempt to evade payment of the tax, that this assessment was made under a charge of fraud and, therefore, was legally made. The plaintiff re-

plies that he has denied the fraud, that fraud is never presumed and that, therefore, the burden was on the Commissioner of Internal Revenue to prove it, and that he has done nothing to carry this burden. The defendant relies on the presumptive validity of the assessment of the Commissioner of Internal Revenue.

It is true that an assessment is presumed to be correct, and that the facts found by the Commissioner to support the assessment are presumed to be correct. *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357, 361; *Helvering* v. *Taylor*, 293 U. S. 507; *Johnson Motor Co.* v. *United States*, 79 C. Cls. 151, 159; *Bushman* v. *United States*, 80 C. Cls. 175, 295 U. S. 756; *American Propeller Co.* v. *United States*, 83 C. Cls. 100, 132; *Mauch* v. *Commissioner*, 35 B. T. A. 617, 628; *McCarl* v. *United States, ex rel, Leland*, 42 F. (2d) 346 (App. D. C.); *Jemison* v. *Commissioner*, 45 F. (2d) 4; *Griffiths* v. *Commissioner*, 50 F. (2d) 782. It is also true that fraud will not be presumed. *Vitelli* v. *United States*, 250 U. S. 355; *Duffin* v. *Lucas*, 55 F. (2d) 786; *Jemison* v. *Commissioner*, 45 F. (2d) 4, 5; *Griffiths* v. *Commissioner*, 50 F. (2d) 782. But it is the duty of the Court to draw from the facts proven all reasonable inferences, and where no reasonable inference can be drawn from the facts found or admitted other than that fraud has been committed or attempted, it is sufficiently established. In *Tucker* v. *Moreland*, 10 Peters (U. S.), 58 78, Mr. Justice Story, speaking for the court, said:

> Fraud is not presumed either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

See also *Sioux City* v. *Western Asphalt Paving Corp.*, 223 Iowa 279, 109 A. L. R. 608; *Peterson* v. *Wahlquist*, 125 Neb. 247, 89 A. L. R. 747, and 24 Am. Jur., pp. 89 et seq. California Law Review, Vol. 31, p. 112.

It is to be regretted that neither side saw fit to introduce the testimony of witnesses then admittedly available; but they did not and we must decide the case on the evidence they have presented to us. What is that evidence?

First, that the plaintiff imported in one period 57,099 gallons of distilled spirits, and in another 12,900 gallons.

This is proven by the finding of the Commissioner of Internal Revenue. The parties stipulated: "the assessments * * * were made on the Commissioner's determination that the gallonage referred to was imported and diverted in the period or on the dates shown."

This finding is presumptively correct, and the plaintiff, we think, has offered no testimony that rebuts it. He says he has produced such proof by the allegation in his claim for refund that he had not imported it, which claim, he says, was received in evidence without restriction and, therefore, must be considered as evidence on the question of importation.

The refund claim is in evidence by stipulation of the parties. They stipulated:

> Fourth, that the payment as aforesaid was accompanied by a letter of protest and by claim for refund on Form 843.
>
> Fifth, that amended claims for refund of the tax so paid were thereafter filed with the Collector of Internal Revenue on December 5, 1938, and on December 13, 1938, respectively.
>
> Sixth, that the finally amended claim for refund as filed on December 13, 1938, may be received in evidence.
>
> And I submit a copy of the claim for refund as so finally amended and filed and ask that the same be received in evidence as Plaintiff's exhibit No. 2.
>
> The COMMISSIONER. It will be received.

After agreeing on this stipulation the plaintiff was called to the stand. He was not asked to reaffirm the statements made in the claim and did not do so, nor in any other way did he testify whether or not he had imported the distilled spirits, as the Commissioner of Internal Revenue had alleged.

Under these circumstances we cannot consider the allegations of the refund claim as evidence of the facts therein recited. Defendant's attorney should have made it plain that he was agreeing on its receipt in evidence only as proof of the fact that such a claim had been filed, but not as evidence of the facts therein alleged; but, even though he did not do so, it is not to be implied that he agreed that

its allegations might be so treated, since the plaintiff who had made the allegations was in court ready to testify.

Unless defendant's attorney did so agree, the refund claim is not evidence of the facts therein alleged. It was an ex parte affidavit made without opportunity for cross-examination. It is elementary that such a document rarely, if ever, is admissible to prove the facts therein recited.

When plaintiff took the stand in this case, and thus subjected himself to cross-examination, he did not reaffirm these statements in his direct examination. Plaintiff having failed to offer any proof on the question of importation, there was no duty on defendant's attorney to cross-examine him in reference thereto.

On the proof submitted we must, therefore, take it as true that the plaintiff did import the distilled spirits as found by the Commissioner of Internal Revenue.

The importation was a criminal offense and, of course, was not reported for taxation. If it had been reported the plaintiff would have subjected himself to criminal prosecution. Section 2 of the Act of November 23, 1921 (42 Stat. 222), which was a supplement to the National Prohibition Act, provides in part:

> No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses.

While the Act permitted importations under certain circumstances, the regulations of the Commissioner of Internal Revenue prohibited it, since, in his opinion, the statutory condition permitting the importation had not come about. Section 1631 of Regulations 60 of the Treasury Department, revised March 1924, forbade the importation of distilled spirits, as did also section 2010 of Regulations No. 2 of the Bureau of Prohibition of the Treasury Department. It was not until the promulgation on April 1, 1931 of Reg-

ulations No. 2 of the Bureau of Industrial Alcohol of the Treasury Department that importations were allowed under any circumstances. Section 2009 of these regulations provided for the issuance of a permit for importations upon the payment of the tax levied thereon. But this was after the importations in question; nor did plaintiff secure a permit for the importation.

Whether imported legally or illegally, a minimum internal revenue tax of $1.10 per gallon was due to be paid, or a tax of $6.40 per gallon if diverted for beverage purposes. (Sec. 900 Rev. Act of 1926, c. 27, 44 Stat. 9, 104; and sec. 35 of the National Prohibition Act, c. 85, 41 Stat. 305, 317; *United States* v. *One Ford Coupe*, 272 U. S. 321.) No such tax was paid. This is admitted by the plaintiff.

In the face of these facts can anyone doubt that the liquors were imported with intent to defraud the defendant of the revenue to which it was entitled? Given the fact of importation, a failure for more than seven years to report that importation and a nonpayment of the tax thereon for all that time and not until after assessment by the Commissioner of Internal Revenue, can any other reasonable inference be drawn than that the plaintiff did not intend to pay the tax, but intended to defraud the defendant thereof? We do not think so. *Commercial Credit Corp.* v. *United States*, 18 F. (2d) 927, 929; *United States* v. *One Oldsmobile Coupe*, 22 F. (2d) 441; *United States* v. *One White One-Ton Truck*, 4 F. (2d) 413; *United States* v. *One Cadillac Automobile*, 292 Fed. 773. This being the only reasonable inference to be drawn from the proven facts, fraud has been sufficiently shown.

It remains only to consider defendant's counter-claim. The defendant says that the Commissioner of Internal Revenue not only found importation but also diversion, and, if diverted to beverage purposes the tax due was $6.40, instead of $1.10. It sues for the difference. However, we do not regard the Commissioner's finding of diversion as sufficient proof of this fact, because the Commissioner assessed, not the tax on diversion, but the nondiversion tax. His assessment and his finding were contradictory. One offsets the other. There is no other proof of diversion.

The allegations of the counterclaim have not been sufficiently proven, and defendant is not entitled to recover thereon.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ANDREW W. SMITH v. THE UNITED STATES

[No. 45291. Decided February 1, 1943]

On the Proofs

Pay and allowances; officer in Medical Corps, U. S. Army, rated as qualified airplane pilot entitled to pay of flying officer.—Where plaintiff, an officer in the Medical Corps, U. S. Army, after completing the regular training course in flying and after having demonstrated his fitness therefor was given the rating of an airplane pilot by the War Department, effective April 30, 1920; and where thereafter plaintiff was detailed to duty requiring regular and frequent participation in aerial flights, entitling him to flying pay; *held* that plaintiff was a flying officer and is accordingly entitled to recover pay as a flying officer from October 1, 1934, plaintiff's petition in the instant case having been filed October 29, 1940.

Same; statutory definition of "flying officer."—A flight surgeon who is a qualified pilot is under Army regulations (War Department Circular No. 7, June 14, 1920) recognized as a flying officer and is entitled to the pay of a flying officer. See *Brown* v. *United States*, 68 C. Cls. 734, 736.

Same; accrual of pay begins at end of month; statute of limitation.—Under the decision in *Page* v. *United States*, 73 C. Cls. 626, an officer's right to increased pay (as to rental and subsistence allowances) does not accrue until the end of a given month, and the statute of limitation does not, as to the pay for that month, begin to run until the end of that month. See also *Tricou* v. *United States*, 71 C. Cls. 356, and *White* v. *United States*, 95 C. Cls. 400.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Andrew W. Smith, was appointed First Lieutenant, Medical Corps, O. R. C., April 25, 1917, accepted on May 3, 1917, and entered on duty June 1, 1917; he was promoted to Captain, Medical Corps, December 1, 1917, accepted December 5, 1917, and vacated December 19, 1917. He was appointed First Lieutenant, Medical Corps, Regular Army, November 11, 1917, which appointment he accepted on December 19, 1917; promoted to Captain, November 24, 1918, and accepted March 20, 1919, and promoted to Major, June 1, 1929, and Lieutenant Colonel on June 1, 1937, which rank he held on June 26, 1941, the date testimony was taken in this case.

The reply of the War Department is made a part of this finding by reference.

2. After completing the regular course in flying and having demonstrated his fitness for the rating as airplane pilot, plaintiff, then a Captain, was given such rating by Personnel Orders No. 112, War Department, dated May 12, 1920, the pertinent part of which follows:

> 10. Under the provisions of Paragraph 1584½ Army Regulations, Captain ANDREW W. SMITH, Medical Corps, having demonstrated his fitness for such rating is rated as an Airplane Pilot, effective April 30, 1920.

3. Plaintiff has been on duty with an aeronautical unit almost continuously since his rating as an airplane pilot in 1920. (See Finding 5.) His rating as airplane pilot has never been revoked, and since such rating he has flown under orders of competent authority approximately 2,300 hours as a pilot, and each year has fulfilled the requirements of the flying directive of the Chief of Air Corps as a pilot in service types of aircraft. He has also flown approximately 617 hours as an observer and passenger.

4. By paragraph 3 of Personnel Orders No. 293, War Department, dated December 15, 1933, the plaintiff, then a Major, was detailed to duty requiring regular and frequent participation in aerial flights, the pertinent part of which reads as follows:

Effective January 1, 1934, the following Medical Corps officers, qualified Flight Surgeons, are detailed to duty requiring regular and frequent participation in aerial flights, pursuant to Army Regulations 35–1480, during such period as they may be assigned to duty with any aeronautic headquarters or unit or assigned to duty at a station where there is an aeronautic unit:

* * * * *

Major Andrew W. Smith, Medical Corps

* * * * *

This detail to duty involving flying requires aerial flights for the purpose of study and observation of the physical and psychological condition of flying personnel.

By order of the Chief of the Air Corps:

5. Plaintiff was relieved temporarily from duty involving flying, effective June 30, 1935, but on March 28, 1939, he was again detailed to duty involving flying, effective March 31, 1939. On June 3, 1939, he was relieved temporarily from duty requiring participation in aerial flights, effective on that date.

On July 22, 1939, plaintiff was again detailed to duty involving flying, effective on that date. During his periods of flying duty plaintiff was required to participate regularly and frequently in aerial flights, and under orders of competent authority performed the flights prescribed by the Executive Order of June 27, 1932, entitling him to flying pay.

6. During the period of plaintiff's claim he has received, in addition to his base and longevity pay, flying pay as follows: From July 1, 1934, to June 30, 1935, and from March 31, 1939, to June 2, 1939, at the rate of $120 a month, or $1,440 a year, less percentage deductions on account of the Economy Act when applicable, and from July 22, 1939, to October 31, 1940, at the rate of $60 a month or $720 a year.

7. The petition was filed October 29, 1940. If the plaintiff is entitled to 50% of his base and longevity pay by reason of performing aerial flights during the period of this claim and from October 29, 1934, there would be due him from October 29, 1934, to June 30, 1935, and from March 31, 1939, to June 2, 1939, and from July 22, 1939, to October 31, 1940,

the sum of $2,536.31, as computed by the General Accounting Office.

Dating the period of plaintiff's claim back to October 1, 1934, and including 50% of his base and longevity pay for the twenty-eight days prior to October 29, 1934, there would be due an additional sum of $32.14, or a total of $2,568.45.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The plaintiff sues to recover flying pay based on his rating as an airplane pilot.

At the beginning of the period involved herein plaintiff was a major, Medical Corps, Regular Army. On June 1, 1937, he was promoted to lieutenant colonel. After completing the regular course in flying and having demonstrated his fitness for rating as an airplane pilot, plaintiff was given such a rating by the War Department effective April 30, 1920. He was detailed to duty requiring regular and frequent participation in aerial flights, and performed the duties which entitled him to flying pay.

However, for the periods in which he performed flying duty, plaintiff was not paid an increase of 50 per centum of his pay, provided for flying officers by the Act of July 2, 1926, section 2, 44 Stat. 781, but instead was paid for flying duty $1,440 per annum, less percentage deductions on account of the Economy Act when applicable, for the periods July 1, 1934, to June 30, 1935, and from March 31, 1939, to June 2, 1939, and $720 per annum from July 22, 1939 to October 31, 1940, maxima established respectively by the Act of April 26, 1934, 48 Stat. 614, 618, and like successive appropriation acts, and the Act of June 13, 1940, 54 Stat. 350, 354, for non-flying officers.

The distinction between flying and non-flying officers is statutory. It is agreed that plaintiff was rated as an airplane pilot. That plaintiff, being rated as an airplane pilot, was thereby, under the statute, a flying officer, cannot well be questioned. As the Act of October 4, 1940, 54 Stat. 963, expresses it, a flying officer is defined as one who has received an aeronautical rating as a pilot of service types of aircraft

or one who has received an aeronautical rating as an aircraft observer or as any other member of a combat crew under such regulations as the Secretary of War may prescribe.

However, the fact in this case is that plaintiff was also a Flight Surgeon. Defendant's counsel attempts to show that under the statute, Flight Surgeons are by definition non-flying officers. But the statutes cited do not bear this out. For all that the record shows, there are Flight Surgeons who are qualified airplane pilots and Flight Surgeons who are not so qualified. Plaintiff was a qualified airplane pilot and entitled to the pay of a flying officer. If he had been a Flight Surgeon without qualifying as an airplane pilot (the statute, Act of April 26, 1939, 53 Stat. 592, 596, appears to assume there are non-flying flight surgeons), the situation might be different.

The order detailing plaintiff and certain other Medical Corps officers to flying duty stated:

> This detail to duty involving flying requires aerial flights for the purpose of study and observation of the physical and psychological condition of flying personnel.

In *Brown* v. *United States*, 68 C. Cls. 734, 736, the findings made by this court quote the following from War Department Circular No. 78, published June 14, 1920:

> * * * It has been demonstrated that the flight surgeon who is himself a flier is better qualified to do his special work in that he has experienced all of the sensations of flying, appreciates the stress which the flier undergoes, recognizes more quickly improper handling of airplanes by pilots, when due to staleness or other physical causes, and, most important of all, being a flier, he has the confidence and esteem of his fellow fliers.

This recognized the existence of flight surgeons who are flying officers. Plaintiff was one of them and is entitled to their flying pay.

Defendant contends that in any event additional pay is not recoverable for services performed prior to October 29, 1934, petition having been filed October 29, 1940. Plaintiff has dated the recoverable period back to the beginning of October, 1934, the controverted amount being $32.14.

We are of the opinion that plaintiff is entitled to recover from October 1, 1934. In *Page* v. *United States*, 73 C. Cls. 626, we held that an officer's right to rental and subsistence allowances does not accrue until the end of a given month, and the statute of limitations does not, as to the allowances for that month, begin to run until the end of the month. See also *Tricou* v. *United States*, 71 C. Cls. 356 and *White* v. *United States*, 95 C. Cls. 400.

Plaintiff is entitled to recover $2,568.45. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

ERIK H. F. LUNDBLAD v. THE UNITED STATES

[No. 45320. Decided February 1, 1943]

On the Proofs

Pay and allowances; rental allowance; failure to request quarters not an estoppel.—Where plaintiff, a Warrant Officer, Army Mine Planter Service, U. S. Army, with a wife, during the period from January 26, 1935, to March 2, 1937, was on duty on the mine planter *Col. Geo. F. E. Harrison* stationed at Fort Mills, Philippine Islands; and where plaintiff during such period was on continuous sea duty, except for five occasions when the mine planter was undergoing repairs, on which occasions plaintiff occupied a furnished room at his own expense; and where plaintiff did not request assignment of quarters; and where he was not assigned the quarters to which he was entitled or given a rental allowance in lieu thereof; it is *held* that plaintiff is entitled to recover.

Same; statutory right to quarters or a money allowance.—The first paragraph of section 6 of the Act of June 10, 1922 (42 Stat. 625, 628), created in the plaintiff an absolute right "to a money allowance for rental of quarters" unless he was assigned the number of rooms to which he was entitled under section 11 of the statute (42 Stat. 630).

Same; silence not an estoppel in absence of duty to speak.—Mere silence or "standing by" never gives rise to an estoppel unless there is a duty on the party to speak. *Wiser* v. *Lawler*, 189 U. S. 260, and other cases cited.

Same; duty of Commanding Officer to make assignments of quarters.—Under the applicable statutes and Army regulations it is the duty of the Commanding Officer to make assignments of quarters in accordance with such statutes and regulations.

Same; not duty of officer to request Commanding Officer to perform statutory duty.—It is not the duty of an officer to request the Commanding Officer to perform the duty of assigning quarters imposed upon said Commanding Officer by the statutes and pertinent regulations; and in the absence of such duty to make such request the officer is not estopped to claim that to which he is entitled under the law.

Same; statement not under oath; admissibility; contemporary record.—Where there is in the record a statement by the Commanding General that there were quarters available, but such statement was not made under oath, and there was no opportunity for cross-examination; it is *held* that such statement was not admissible under section 695 of Title 28, of the Judicial Code, not being a contemporary record of the transaction.

Same; no obligation on plaintiff to show that quarters were not available.—Under the Act of May 31, 1924 (43 Stat. 250), under which plaintiff sues in the instant case, there is no obligation on plaintiff to show that public quarters were not available; and under said act it is sufficient for plaintiff to show that proper quarters to which he was lawfully entitled were not assigned to him and that in lieu of such assignment money allowance was not paid to plaintiff.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Messrs. Ansell, Ansell & Marshall* were on the briefs.

Mr. E. L. Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff served in the U. S. Coast Guard from March 21, 1911, to November 13, 1911, and in the U. S. Navy (active) from July 17, 1918, to November 22, 1919. He was appointed a Warrant Officer, Army Mine Planter Service, U. S. Army, January 20, 1920, accepted January 22, 1920, and served continuously as such to December 31, 1938, the date of his retirement.

2. January 23, 1935, plaintiff was assigned to duty aboard the Mine Planter *Col. Geo. F. E. Harrison* stationed at Fort Mills, P. I. He remained on this assignment throughout the period from January 26, 1935, to March 2, 1937, hereinafter sometimes referred to as the "period of the claim." The Mine Planter to which plaintiff was assigned

operated from Fort Mills and around the Philippine Islands and adjacent islands in connection with mine planting. It also carried the Commanding General on inspection tours of the Philippine Islands.

Throughout the period of the claim from January 26, 1935 to March 2, 1937, inclusive, plaintiff was on continuous sea duty except for five occasions when the Mine Planter had to undergo major repairs, thus spending most of his time at sea. He was never assigned to shore duty during that period.

3. Plaintiff was married July 9, 1918, and since that time his wife has been dependent on him for her support. His wife did not accompany him to the Philippine Islands upon his assignment to duty on the Mine Planter *Harrison*, but resided at all times during the period of the claim in San Francisco, California. She did not occupy Government quarters at any time. Her health was bad throughout the period of the claim. Plaintiff made a monthly allotment of $90 toward her support and, in addition, from time to time sent her money of different amounts.

4. Upon his arrival at the Philippines on a transport, for assignment to duty on the Mine Planter *Harrison*, orders were issued to incoming passengers where to proceed and as to the assignment of quarters. Plaintiff looked over the list of names of those who had been assigned quarters and found that his name was not included and, other than hereinafter mentioned, no quarters were assigned to him. Plaintiff, however, neither at that time nor until February 27, 1937, brought to the attention of any official the omission of his name from the list of those who were assigned quarters, nor his failure to have quarters assigned to him. No verbal or written refusal to furnish quarters was given prior to February 27, 1937, nor was plaintiff advised that none were available.

When a vessel such as the Mine Planter *Harrison* is at sea, or at the port alongside the dock, sleeping quarters are provided for the Warrant Officer as well as for the other officers of higher rank and, in addition, these officers are provided with quarters on shore. One of the reasons the officers are allotted quarters and accommodations on shore is that

when the vessel is undergoing repairs or having its boilers cleaned, the quarters alloted them in the vessel are not suitable for habitation.

During the period of the claim, plaintiff rented a furnished room with bath for which he paid $42 a month in United States currency.

5. March 2, 1937, plaintiff departed from his station in the Philippines, having been assigned to duty at Fort Worden, Washington, and availed himself of three months' leave of absence before proceeding to his new post of duty.

Shortly prior to leaving the Philippines, namely, February 27, 1937, plaintiff applied to the Commanding General, Fort Mills, P. I., for commutation of quarters for the period from January 26, 1935 to March 3, 1937, and in his letter of application assigned the following ground for his claim:

> In view of the fact that as a Warrant Officer in the U. S. ARMY MINE PLANTER SERVICE with a dependent wife without any permanent or temporary quarters at Fort Mills assigned to me, it is requested that I be granted commutation of quarters for the period for which I have not been assigned quarters at this station and for which I am submitting the attached voucher covering said period.

After the statements in plaintiff's communication had been checked by his commanding officer and found correct, the finance officer at that station gave as his opinion that the claim was not legally payable—

> Due to the following facts and assumed facts:
> *a.* That married quarters were available for assignment,
> *b.* That no request for married quarters was made to the Commanding General, HD of M&S Bays,
> *c.* That no appeal was made to the Department Commander due to the fact that no married quarters were assigned, and
> *d.* That this claim is similar to the claims which received adverse decisions by the Comptroller * * *.

After that opinion had been rendered, plaintiff was requested to answer certain questions in regard to his status, and the facts and assumed facts referred to in the finance officer's opinion. At that time plaintiff was on leave, but

when the request for the information finally reached him, he requested on June 15, 1937 that the claim be dropped.

6. December 29, 1937, plaintiff again brought the matter of rental allowance to the attention of the Commanding General, Fort Mills, P. I., with the request that he be furnished a certificate as to quarters to support his voucher for rental allowance for the period February 1, 1935, to February 28, 1937, while on duty on the Mine Planter *Harrison*. Upon receipt of that request, reference was made in the several endorsements thereon to the failure of plaintiff to supply certain information in regard to a similar claim referred to in the preceding finding and to his request that the other claim be dropped. February 23, 1938, the Commanding General at Fort Mills recommended that plaintiff's request be denied for the following reasons:

> 1. Attention is invited to the attached original claim of Warrant Officer Lundblad which he withdrew rather than furnish the information requested in 3rd indorsement thereon.
>
> 2. The Commanding General, Fort Mills, cannot sign the certificate to the attached voucher for the reason that during the period for which rental allowance is claimed, Warrant Officer Lundblad, unaccompanied by dependents, occupied without protest as quarters accommodations on the Mine Planter *Harrison*. There were quarters available for him ashore had he made request therefor.
>
> 3. It is recommended that Warrant Officer Lundblad be advised that the certificate to his pay and allowance account claiming rental allowance will not be accomplished, and there [that] it is his privilege to file a claim with the General Accounting Office.

The recommendation of the Commanding General was approved by the Adjutant General, War Department, Washington, D. C., March 30, 1938.

Thereafter plaintiff presented his claim to the Comptroller General, who disallowed it August 2, 1938, for reasons similar to those set out above by the Commanding General at Fort Mills, and no rental allowance has been paid plaintiff for the period of the claim.

7. Plaintiff is entitled to a rental allowance for the period of January 26, 1935 to March 2, 1937, inclusive, in the sum of $1,005.00.

The court decided that the plaintiff was entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

Plaintiff, a Warrant Officer, Army Mine Planter Service, United States Army, sues for the rental allowance to which he is entitled under the Act of May 31, 1924 (43 Stat. 250), for the period from January 26, 1935 to March 2, 1937, inclusive. During this period the plaintiff was on duty on the mine planter *Col. Geo. F. E. Harrison* stationed at Fort Mills, Philippine Islands. Throughout this period he was on continuous sea duty, except for five occasions when the mine planter had to undergo major repairs, during which time he occupied a furnished room, for which he paid $42.00 a month in United States currency.

Sometime prior to the period of the claim plaintiff arrived at the Philippine Islands on an army transport to assume his duties on the mine planter *Harrison*. On arrival orders were issued to the incoming passengers assigning them quarters. Plaintiff's name was not on the list, and neither then nor at any other time during the period of the claim has he been assigned quarters, although he was entitled to them, or a rental allowance in lieu thereof, even while at sea, by reason of the fact that he had a dependent wife. At no time during his tour of duty in the Philippines did plaintiff request assignment of quarters. He explains his failure to do so as follows:

> On the same boat arriving in the Philippines was First Mate Frank Lang. He was single and he was assigned quarters at Fort Mills. My name could not be found in the list so I presumed that there was no quarters available for me at Fort Mills.
>
> * * * * *
>
> In my previous tour of duty in the Philippines, namely, from March 3, 1930, to March 3, 1932, I was assigned quarters ashore at Fort Mills. After a short period, my quarters was taken away from me and rent allowance paid for that period. On that assumption, I then believe[d] that when no quarters are assigned to me, there was none available for me, and that is the reason I am claiming rental allowance.

Because the health of plaintiff's wife was bad she did not accompany him to the Philippine Islands, but remained in San Francisco.

The first paragraph of section 6 of the Act of June 10, 1922, as amended by section 2 of the Act of May 31, 1924 (43 Stat. 250), under which plaintiff claims, reads in part as follows:

> SEC. 6. Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters.
>
> * * * * *

The fourth paragraph referred to reads as follows:

> No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents.

Section 11 of the Act of June 10, 1922 (42 Stat. 630), makes the provision for a money allowance for rental of quarters applicable to warrant officers, Army Mine Planter Service.

The first paragraph of section 6 created in the plaintiff an absolute right "to a money allowance for rental of quarters" unless he came within one of the exceptions enumerated in the fourth paragraph of this section. The first exception applies only to an officer without dependents and, therefore, has no application to plaintiff. The second exception is applicable to plaintiff because applicable to an officer with or without dependents. Under this exception an officer is not entitled to a money allowance for rental of quarters if he is assigned the number of rooms to which he is entitled under the law.

It is admitted that this plaintiff was not assigned any rooms at all and, therefore, it would appear that he is

entitled to the "money allowance for rental of quarters." But, the defendant says this is not so because he did not request an assignment of quarters. Defendant's theory seems to be that his failure to do so created some sort of estoppel against his demanding the rights accorded him by statute.

No estoppel could arise from plaintiff's failure to make this request unless there was a duty upon him to make it. Mere silence or "standing by" never gives rise to an estoppel unless there is a duty on the party to speak. *Wiser* v. *Lawler*, 189 U. S. 260; *Crary* v. *Dye*, 208 U. S. 515; *Gerlach Co.* v. *Noyes*, 251 Mass. 558; 45 A. L. R. 961; *Fraser* v. *Portland*, 81 Ore. 92; 9 A. L. R. 614; *Nelson* v. *Chicago Mill & Lumber Corp.* 76 F. (2d) 17, 100 A. L. R. 87. The defendant in its brief points to no Army Regulation or General Order or anything else that imposes upon an officer the duty of requesting assignment of quarters. The duty of making the assignment is on the Commanding Officer. Paragraph 11 (b) of Executive Order No. 4063, dated August 13, 1924, reads in part as follows:

> (b) Every officer permanently stationed at a post, yard, or station where public quarters are available, will be assigned thereat as quarters the number of rooms prescribed by law for an officer of his rank, or a less number of rooms determined by competent superior authority, in accordance with regulations of the Department concerned, to be adequate in the particular case for the occupancy of the officer and his dependents, if any; * * *

See also Army Regulations 210–70, sec. 2, bj (2). The Commanding Officer is in charge of quarters at the Post and only he, or someone for him, can make the assignment. There is nothing that has been pointed out to us or that we have been able to find that imposes upon an officer the duty of requesting the Commanding Officer to perform the duty imposed upon him by the law and regulations.

In the absence of a duty to make this request, the officer is not estopped to claim that to which he is entitled under the law.

Indeed, there is no competent evidence in the record to show that the situation would have been any different even though this officer had requested assignment of quarters, because there is no competent evidence in the record to show that public quarters were available. There is a statement by the Commanding General that there were quarters available, but this statement was not made under oath, and the plaintiff was not given the opportunity of cross-examining him. The statement was not, as defendant says, a contemporary record of the transaction it recorded, nor is it admissible, as claimed, under section 695 of Title 28 of the Judicial Code.

If no quarters were available, none could have been assigned, in which case plaintiff clearly would have been entitled to the money allowance.

But defendant says that the affirmative duty is on the plaintiff to prove that quarters were not available, for which he cites as authority *Crosby* v. *United States*, 13 C. Cls. 110. It is true that in a one paragraph opinion we did hold in that case that the duty was upon an officer to show that no quarters were available, as a condition precedent to his right to recover the money allowance. The opinion does not cite or quote the statute in force at the time. We presume it must have been similar to the Act of June 10, 1922 (42 Stat. 625), which entitled an officer to a money allowance for rental of quarters "if public quarters are not available." Under such an Act, there probably would be an obligation upon the plaintiff to show that public quarters were not available; but not so under the Act of May 31, 1924 (43 Stat. 250), under which plaintiff sues. That Act does not cast upon the plaintiff the burden of showing that public quarters were not available; all that it requires him to do is to show that he was not assigned the proper number of rooms. *James B. Lake, Jr.* v. *United States*, No. 43912, decided December 7, 1942, 97 C. Cls. 447.

Judgment will be rendered for the plaintiff against the United States for the sum of $1,005.00. It is so ordered.

Madden, *Judge;* Jones, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

MRS. LOIS THOM NICHOL v. THE UNITED STATES

[No. 45335. Decided February 1, 1943]

On the Proofs

Income tax; proceeds of judgment and interest thereon; capital gain.—Where taxpayer in 1926, as the result of misrepresentations by another, sold certain stocks at less than actual value but at a gain, which was taxable in 1926; and where thereafter in 1936, after suit, taxpayer obtained a judgment representing difference between amount received for such stocks and their actual value, plus interest; plaintiff's additional gains in 1936 were taxable as income on the same basis as the gain received in 1926.

Same.—Taxpayer's gain realized in 1926 was clearly taxable, since in essence taxpayer's suit on which judgment was obtained was brought to recover additional unrealized gains to which she claimed she was entitled as of November 1926; and these additional gains when finally recovered in 1936 had the same status as income as that portion of the 1926 payment which represented gain; whether called damages or gains the additional amount recovered under judgment represented gains.

Same; interest on principal amount of judgment.—Interest collected on judgment should be treated as income under the controlling decision in *Kieselbach* v. *Commissioner of Internal Revenue*, 317 U. S. 399.

The Reporter's statement of the case:

Mr. J. C. Murphy for the plaintiff.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

Plaintiff in her income tax return for the tax year 1936 included in gross income for said year the sum of $4,250.60, representing 30% of $14,168.72, treated in the return as gain on a capital asset, which latter sum was the remainder of a judgment for $22,600 principal, after deduction of the pro rata portion of expenses of recovery allocable thereto; and plaintiff in said return for 1936 also included in such gross income the sum of $8,612.16, being the remainder of the interest in the full amount of $13,772.72 allowed by the court on

such judgment after deduction of the allocable pro rata portion of the expenses of recovery.

After investigation and conference it was determined by the Commissioner of Internal Revenue that 40% of the said $14,168.72, or $5,667.49, was returnable as income instead of 30%, such capital asset having been held for more than five years but less than ten years; and plaintiff paid the deficiency tax assessed under such determination; and filed a claim for refund, on the bases (1) that none of the proceeds of the said judgment was taxable regardless of the element of interest included therein and (2) that, in any event, and if such proceeds were taxable at all, they should be taxed in their entirety as capital gain because, although a portion of the total amount recovered was designated as interest, the whole was in reality a judgment for damages, which claim for refund was rejected by the Commissioner.

The court held that the determination of the Commissioner was proper and that the plaintiff was not entitled to recover.

The court made special findings of fact as follows:

1. Plaintiff is now and at all times material hereto has been a citizen of the United States and a resident of Atlanta, Georgia.

2. Plaintiff filed her income tax return for the calendar year 1936 in the office of the Collector of Internal Revenue for the District of Georgia on April 16, 1937, having secured an extension of the time for such filing until April 15, 1937. Net income in the amount of $20,352.71 was reported therein and tax of $1,549.51 computed thereon. Such tax was duly paid in quarterly instalments during 1937, together with interest amounting to $1.94.

3. Included in the gross income reported by plaintiff in her return for 1936 was the sum of $4,250.60 representing 30% of $14,168.72, which latter sum, treated in the return as gain on a capital asset, was the remainder of a judgment for $22,600 principal, after deduction of the pro rata portion of expenses of recovery allocable thereto. Also included in such gross income was the sum of $8,612.16, being the remainder of the interest in the full amount of $13,779.72 allowed by the court on such judgment after de-

duction of the allocable pro rata portion of the expenses of recovery.

4. Following investigation of the plaintiff's tax liability for 1936 in the field, and the recommendation of deficiency tax in the amount of $1,982.49 by the examining officer, a conference was held at Atlanta between plaintiff's representatives and a representative of the Bureau of Internal Revenue. Such conference resulted in the final determination of deficiency tax in the amount of $234.86, instead of the amount found by the revenue agent. This deficiency was due to the addition to income of two items totalling $76.12, not in dispute and to determining that 40% of the $14,168.72 gain on a capital asset heretofore mentioned, or $5,667.49, was returnable as income, instead of 30%, or $4,250.61, as reported in the return. Such asset was found to have been held for more than five but less than ten years. In the return the asset was reported as having been held for more than ten years.

Plaintiff paid the deficiency tax of $234.86 on May 23, 1939, and she paid interest thereon amounting to $30.83 on June 13, 1939, the total of such tax and interest being $265.69.

5. On April 12, 1940, plaintiff filed a claim for refund of $1,615.09, income tax for 1936, recomputing net income for the year as $7,566.06 and contending (1) that none of the proceeds of the judgment received in that year and reported was taxable regardless of the element of interest included therein, and (2) that in any event, and if such proceeds were taxable at all, they should be taxed in their entirety as capital gain because, although a portion of the total amount recovered was designated as interest, the whole was in reality a judgment for damages. This claim was formally rejected in full by the Bureau of Internal Revenue on August 8, 1940. The petition herein was filed on January 27, 1941.

6. Plaintiff, then a resident of the City of Appleton, Wisconsin, upon the death of her father, Peter Robertson Thom, on March 18, 1920, inherited 468 shares of the common stock and 234 shares of the preferred stock of the Kimberly Clark Company, a Wisconsin corporation, whose home of-

fice was in the City of Neenah, Wisconsin, and whose principal business was the manufacture and sale of pulp and paper products, directly and through subsidiary industrial corporations. Shortly after her father's death plaintiff moved from Appleton, Wisconsin to Detroit, Michigan, prior to her removal to Atlanta, Georgia.

7. Plaintiff's father and one F. J. Sensenbrenner, during the former's lifetime, had been personal friends and closely associated for many years as officials in the business of the Kimberly Clark Company, and plaintiff and other members of her family had profound confidence in the friendship, integrity, and judgment of Sensenbrenner who was first vice-president and general executive officer and manager of the company. Sensenbrenner, however, in October, 1926, withholding from the plaintiff the fact of his interest in and connection with the matter, arranged through another person and a Detroit brokerage firm to procure an offer from plaintiff to sell stock of the Kimberly Clark Company. On November 6, 1926, she offered to sell 100 of her shares at $250 a share and Sensenbrenner directed immediate acceptance. The 100 shares of plaintiff's stock were transferred on the books of the company to the brokerage firm on November 8, 1926. On November 16, 1926, the stock was transferred again on the books of the company, to another person, and finally transferred to Sensenbrenner on December 2, 1926. (*Nichol* v. *Sensenbrenner*, 220 Wis. 165, 173, 174.)

8. On December 28, 1931, the plaintiff filed suit against Sensenbrenner in the Circuit Court for Winnebago County, Wisconsin, for the profits reaped and retained by him, being the difference between the actual value of plaintiff's stock at the time of its acquisition by him and the price paid therefor to plaintiff by his agents. She set forth circumstances claimed by her to constitute fraud and deception on her and a breach of his duty to deal with her honestly and in good faith in the transaction involved by making an adequate disclosure of facts affecting the value of the stock.

9. The jury's verdict was for the plaintiff, and among other things it found that the fair cash value of plaintiff's common stock of the Kimberly Clark Company on Novem-

ber 6, 1926, was $476 per share. The lower court therefore ordered the entry of judgment for plaintiff in the amount of $22,600 ($47,600 less $25,000 paid) with interest thereon at the rate of 6% per annum, from June 29, 1934, the date of the verdict, to December 29, 1934, the date of entry of judgment, amounting to $678. The lower court denied plaintiff's motion for interest upon the sum of $22,600 from November 6, 1926, to June 29, 1934.

10. Sensenbrenner appealed from the judgment of the lower court, and plaintiff gave notice of review on the appeal, alleging, among other things, that the trial court erred in denying interest from the date of the sale of her stock, namely, November 6, 1926. The Supreme Court of Wisconsin concluded that the plaintiff was entitled to interest on the judgment of $22,600 at 6% per annum from November 6, 1926, to the date of the verdict, and on February 4, 1936, it affirmed the judgment as so modified. (*Nichol* v. *Sensenbrenner*, 220 Wis. 165, 182, 184; 263 N. W. 650.) Interest computed on that basis amounted to $13,779.72 as reported, subject to pro rata deduction by plaintiff in her income tax return for 1936. The total of the judgment and the interest thereon was $36,379.72.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This is a suit to recover a portion of the income tax paid by plaintiff in 1936.

Upon the death of her father in 1920 the plaintiff inherited certain shares of stock in the Kimberly Clark Company.

F. J. Sensenbrenner, the vice president and manager of the company, had long been associated with her father in business. Plaintiff and her family had complete confidence in his friendship and integrity.

On November 6, 1926, upon the recommendation of Sensenbrenner, plaintiff sold to a brokerage firm 100 shares of the stock of the Kimberly Clark Company for $250 per share. On November 16, 1926, the stock was transferred

to a third party and on December 2, 1926, it was transferred to Sensenbrenner. It developed that the stock was worth considerably more than the $250 per share.

On December 28, 1931, the plaintiff filed suit against Sensenbrenner in the Circuit Court for Winnebago County, Wisconsin, for the profits reaped and retained by him; that is, the difference between the actual value of plaintiff's stock at the time of its acquisition by Sensenbrenner and the price which had been paid the plaintiff by his agents, alleging that fraud and deception had been practiced on her.

The jury returned a verdict for plaintiff in the sum of $22,600. The trial court entered judgment for that sum, together with interest at the rate of 6% per annum from June 29, 1934, the date of the verdict. On appeal the Supreme Court of Wisconsin reformed the judgment allowing plaintiff interest at the rate of six per cent per annum from November 6, 1926. Interest computed on that basis amounted to $13,779.72, which, less the deduction of expense of collection, was reported in her income tax return for 1936. The tax was paid on that basis.

Plaintiff filed a timely claim for refund in the sum of $1,615.09 on the basis of two contentions; first, none of the proceeds of the judgment received in the year 1936 and reported was taxable income, regardless of the element of interest included therein; and, second, that if such proceeds were taxable at all, they should be taxed in their entirety as capital gain, because while a portion of the total amount recovered was designated as interest, the entire amount was in reality a judgment for damages.

We think the taxes were properly levied and collected by the Commissioner of Internal Revenue.

Clearly the gain realized in 1926 was taxable. In essence her suit was brought to recover additional unrealized gains to which she claimed she was entitled as of November 1926. These additional gains, when she finally recovered them in 1936, had the same status as income as that portion of the 1926 payment which represented gain. Whether they be called damages or gains they represented gains.

We also think that the interest collected should be treated as income. A recent decision by the United States Supreme

Court, *Kieselbach* v. *Commissioner of Internal Revenue*, decided January 4, 1943 (317 U. S. 319), is controlling in this case. The facts are similar and the principle is the same.

In that case the Board of Estimate of the City of New York, pursuant to a charter provision, passed a resolution directing that upon January 3, 1933, the title in fee to a tract of realty should vest in the city. Condemnation proceedings, of which the resolution was a part, were instituted. The city took possession on the date named in the resolution and received all rents thereafter accruing. The Supreme Court of New York entered its final decree on March 31, 1937, allowing payment in the sum of $73,246.57 as compensation to the owners. The amount of said payment was computed by adding to the principal amount of $58,000, interest thereon at the rate of six per cent per annum from January 3, 1933 to May 12, 1937, in the sum of $15,246.57. The primary question was whether the interest should be treated for tax purposes as a portion of the capital gain, or as ordinary income.

In passing on this question the court, after quoting Section 22 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, 1657, makes the following comment:

> The sum paid these taxpayers above the award of $58,000 was paid because of the failure to put the award in the taxpayers' hands on the day, January 3, 1933, when the property was taken. This additional payment was necessary to give the owner the full equivalent of the value of the property at the time it was taken. Whether one calls it interest on the value or payments to meet the constitutional requirement of just compensation is immaterial. It is income under Sec. 22, paid to the taxpayers in lieu of what they might have earned on the sum found to be the value of the property on the day the property was taken. It is not a capital gain upon an asset sold under Sec. 117. The sale price was the $58,000.
>
> The property was turned over in January 1933, by the resolution. This was the sale. Title then passed. The subsequent earnings of the property went to the city. The transaction was as though a purchase money lien at legal interest was retained upon the property. Such interest when paid would, of course, be ordinary income.

The plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

FLORENCE P. BLACKMAN v. THE UNITED STATES

No. 45477

BERNARD M. PALMER v. THE UNITED STATES

No. 45478

[Decided February 1, 1943]

On the Proofs

Estate tax; termination of trust established in 1924 and creation in 1928 of a new trust with similar rights of decedent as to income and distribution of corpus.—Where decedent in 1924 transferred to certain trustees, of which decedent was one, substantially all of his property under a trust instrument prohibiting sale of certain stock held unless all of such stock was sold; and where in 1928 said trust was terminated and new trust instrument was executed by settlor and beneficiaries with substantially the same conditions but without restrictive provisions as to sale of said stock, and with changes as to the termination of the trust; both in form and substance the 1928 trust was something different from the 1924 trust, and for estate tax purposes the property rights of decedent in the trust property must be adjudged on the basis of the 1928 trust instrument.

Same; inclusion of decedent's interest in gross estate subject to estate tax.—Where under the 1928 trust agreement, of which settlor was a trustee and beneficiary, settlor together with other beneficiaries, had the right to revoke the trust and upon revocation, settlor would have been entitled to receive one-half of the corpus, and where settlor's rights ended at his death and such half passed to members of his family; the value of settlor's one-half interest was properly included in decedent's gross estate for estate tax purposes under the provisions of section 302 (d) of the Revenue Act of 1926 (44 Stat. 9, 71).

Same; "settlor."—Where upon termination of trust settlor waived his right to receive one-half of the corpus and joined in the direction that the trust property be divided among beneficiaries equally, relying upon a prior agreement that said property would

be conveyed to a new trust in which settlor would be entitled to share; settlor was also "settlor" of the new trust, and the share to which he would have been entitled in event of termination of new trust should be included in determining settlor's estate tax.

Same; transfer of property to trust not made by decedent but at his instigation.—While decedent did not directly make a transfer of property to the 1928 trust he caused others to make the transfer in such a manner that he retained a valuable interest therein, and it is well established that the person who furnishes the consideration for the creation of a trust is the "settlor" even though in form the trust is created by another. *Lehman* v. *Commissioner*, 109 Fed. (2d) 99; certiorari denied 310 U. S. 637; *Buhl* v. *Kavanagh*, 118 Fed. (2d) 315, cited.

The Reporter's statement of the case:

Mr. Hiram M. Nowlan for the plaintiff. *Mr. Otto A. Oestreich* was on the briefs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs, Florence P. Blackman and Bernard M. Palmer, individuals, are residents of California and Wisconsin, respectively, and are the daughter and son, respectively, of William F. Palmer, deceased.

2. William F. Palmer (hereinafter sometimes referred to as the "decedent") died in California February 1, 1933. Florence P. Blackman, as administratrix of the decedent, filed an estate tax return January 24, 1934, showing a gross estate of $171,577.79 and deductions of $151,695.09 which, with the specific exemption allowed, resulted in no net estate and no tax due. Under a schedule in that return dealing with the transfers involved in these proceedings, the following explanation was given of the date, amount or value, and motive which actuated the decedent in making the transfer:

> Jan. 14, 1924, $250,000, Love and affection—Transfer made by Trust in which decedent retained portion of income not taxable under Act [Art.] 18, Reg. 70 because made prior to March 3, 1931; Copies of Trust Agreement submitted herewith.

3. After an examination of the estate tax return, the Commissioner, on December 14, 1936, advised Florence P. Blackman, as administratrix, of a deficiency in estate tax of $159,486.89. In arriving at that deficiency, the gross estate was increased by the amount of $1,205,957.11 with the following explanation:

> It appears that on or about January 14, 1924, the decedent, William F. Palmer, transferred to certain trustees (of whom the decedent was one) property of the value on the date of decedent's death of $2,411,-914.21; that the property so transferred was substantially all of decedent's property and no definite plausible motive has been shown; that it was provided in the instrument of transfer that the decedent should receive one-half of the income during his lifetime; that it was further provided that the trust might be terminated by the consent of the trustees and all of the adult beneficiaries who were at the time entitled to receive the income; that it was further provided that on such termination the principal of the trust estate was to be distributed among the persons entitled to share in the income, the principal to be distributed among such persons in the same proportions in which they were entitled to share in the income; that on or about November 23, 1928, the trustees and adult beneficiaries enjoying the income (decedent being and having been at all times since the creation of the trust, one of the trustees and an adult beneficiary enoying [sic] one-half of the income) terminated the said trust (upon which one-half of the principal became the property of the decedent), and directed in the notice of termination that the principal should be delivered one-half each to the other two adult beneficiaries, Bernard M. Palmer and Florence P. Blackman, and thereupon, and on the same date and as part of the same transaction, the said Bernard M. Palmer and Florence P. Blackman reconveyed the same property to the same trustees by an instrument containing substantially the same provisions as the trust instrument of January 14, 1924, including the provisions for payment of one-half of the income to the decedent for his life, and the provision for termination of the trust with the consent of the trustees and adult beneficiaries entitled to the income, and delivery of the principal on such termination.
>
> The Bureau holds that one-half of the value of the property comprised within the trust must be included

in the decedent's gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926, as amended.

On the same day similar letters were sent to Florence P. Blackman and Bernard M. Palmer on account of their relationship to the estate as legatee, beneficiary, trustee, and transferee, and each of these letters showed the same deficiency as that set out above.

4. April 9, 1937, Florence P. Blackman paid $94,810.59 on account of the deficiency referred to in the preceding finding and April 9, 1937, Bernard M. Palmer paid $94,-810.58, which amounts included interest on the deficiency of $30,134.28, and made the total payment $189,621.17.

5. March 22, 1940, Florence P. Blackman filed a claim for refund of $189,621.17, the entire amount paid as shown in the preceding finding. On the same day a second claim for refund was filed by Bernard M. Palmer, and a third claim by Florence P. Blackman and Bernard M. Palmer, jointly, each for the same amount as that set out in the claim filed by Florence P. Blackman. Each of the claims assigned the same ground, namely, that the transaction referred to in the Commissioner's letter of December 14, 1936, on account of which the Commissioner increased the gross estate, was not a transfer in contemplation of death and that the holding of the Commissioner that one-half of the value of the property comprised within the trust must be included in the decedent's gross estate under the provisions of Section 302 (c) and (d) of the Revenue Act of 1926, as amended, was erroneous. The Commissioner rejected these claims July 17, 1940, and notified plaintiffs of this action by letter of the same date.

6. Since about 1891 the decedent had been connected with the Parker Pen Company and on January 14, 1924, owned or controlled one-half of its common stock, the other half being owned or controlled by George S. Parker who was president of the company. The total common capital stock of the company at that time was 10,000 shares. The decedent was secretary and treasurer, Bernard M. Palmer was credit and collection manager, and Horace L. Black-

man, husband of Florence P. Blackman, was sales manager of the company. The decedent, Horace L. Blackman, and Bernard M. Palmer were directors of the company and constituted one-half of its board of directors, the other half being members of the Parker family or controlled by that interest.

7. For some months immediately preceding January 14, 1924, the decedent indicated his desire to create a trust with the stock owned by him in the Parker Pen Company in order to insure the continuity in his family of his one-half interest in that company, and in order that during his lifetime he might have his children, Florence P. Blackman and Bernard M. Palmer, participate in the income from the company while they were young enough to enjoy it and while he could observe their use of such income. At that time the decedent was sixty-nine years old, actively engaged in the business, mentally alert, and at least in general appearance was in good health.

8. January 14, 1924, the decedent created a trust (hereinafter sometimes referred to as the "1924 trust") the corpus of which consisted of the 5,000 shares of common stock of the Parker Pen Company held at that time by him. At all times after its creation, the decedent, Bernard M. Palmer, and Horace L. Blackman were the trustees under the trust instrument. During the lifetime of the decedent, the income from the trust was payable as follows: One-half to the decedent; one-fourth to Florence P. Blackman, or her heirs; and one-fourth to Bernard M. Palmer, or his heirs. After the death of the decedent, one-half of the income was to be paid to Florence P. Blackman, or her heirs, and the other half to Bernard M. Palmer, or his heirs and/or wife, in the manner set out in detail in the trust instrument. The trust was to continue until the death of the survivor of the grantor's two children, their respective wife and husband, and certain named grandchildren then living, with the provision that it might be terminated otherwise in the manner thereinafter provided in the instrument. At the termination of the trust, except as provided in paragraph 16, the principal was to go one-half to the living issue of the son

and one-half to the living issue of the daughter, with other provisions in the event of failure of issue. Paragraph 16 of the instrument provided as follows:

> 16. The trust hereby created may, in the discretion of the Trustees, be terminated in advance of the expiration of the period for which the trust is to continue as provided in paragraph 3 hereof by either one or the other of the following events:
>
> *First:* The consent of the Trustees and all of the adult persons who at the time are beneficiaries entitled to share in the income of the trust estate;
>
> *Second:* The sale of all of the Common Stock of the Parker Pen Company owned by the Trustees and constituting part of the trust estate; provided, however, that the formation by the Trustees of a corporation for the purpose of owning, and to which they shall transfer, all of the shares of Common Stock of The Parker Pen Company belonging to the trust estate, taking to themselves and retaining ownership of, as part of the trust estate, all of the shares of stock of such corporation so formed, which they shall have full power and authority to do if they deem wise, shall not be deemed and treated as a sale of such common stock of The Parker Pen Company for the purposes of this provision relating to termination of the trust, but, in such event, the sale of such stock of The Parker Pen Company, which shall under the provisions hereof be treated as such sale, as will terminate the trust, shall be deemed to have been made only when either (a) the corporation so formed and acquiring such common stock of The Parker Pen Company shall in turn resell it other than a resale of it back to the Trustees, or (b) the Trustees shall sell the stock of the corporation which they shall have so formed and which shall have acquired ownership of such stock of The Parker Pen Company.
>
> In the event of such termination, the principal of the trust estate shall be distributed among and paid and transferred to the persons who at the time of such termination are enitled[sic] to share in the income of the trust estate, and it shall be distributed among and paid and transferred over to them in the same proportions in which they were, immediately prior to such termination, entitled to share in said income.

The instrument further provided that—

> * * * no part of the Common Stock of The Parker Pen Company owned by the trust estate shall be sold or

otherwise disposed of unless all of said Common Stock is simultaneously sold or otherwise disposed of as part of the same transaction; * * *.

9. At the time of the creation of the 1924 trust, Bernard M. Palmer was in comfortable financial circumstances and in addition was receiving a salary as credit manager and one of the directors of the Parker Pen Company. At the same time, Florence P. Blackman had a substantial individual income and her husband had a substantial amount of property in addition to receiving a salary from the Parker Pen Company as sales manager and one of the directors of that company.

10. Between the date of the creation of the 1924 trust and the creation of a second trust (which will be referred to as the "1928 trust"), there was a recapitalization and change in the capital structure of the Parker Pen Company as a result of which its outstanding capital stock was increased to 200,000 shares, one-half of which was owned by George S. Parker and one-half by the 1924 trust. There was also a small amount of preferred stock which was issued as a stock dividend. During that period the Parker Pen Company had been successful and was paying substantial dividends, and efforts had been made by various individuals and investment bankers to induce the owners of the Parker Pen stock to make it available for sale on a public stock exchange. In September 1928 Horace L. Blackman resigned his position with the Parker Pen Company and went to California where he resided thereafter. Shortly after Mr. Blackman went to California, a representative of a reliable investment banking concern in Chicago entered into negotiations for the purchase of 75,000 of the 100,000 shares of the Parker Pen Company stock which were owned by the 1924 trust. The proposed purchase price was considered attractive and the decedent, Florence P. Blackman, and Horace L. Blackman desired to carry out the sale. At that time the decedent was still acting as secretary and treasurer of the company and Bernard M. Palmer as credit and collection manager. As heretofore shown, Horace L. Blackman had resigned his office as sales manager of the company and had moved to California where he resided and was

engaged in other business activities. Bernard M. Palmer did not desire to have the stock sold for the reason that he wished to continue his connection with the Parker Pen Company and remain a resident of Janesville, Wisconsin, where the company was located and where he had recently built a new home. Bernard M. Palmer feared that if the shares of stock were sold and the voting power of the Palmer family thereby reduced to less than 50 percent, he might lose his position with the Parker Pen Company. While Horace L. Blackman was anxious to make the sale, neither he nor any of the other parties sought to influence Bernard M. Palmer unduly in having him agree to the sale.

11. Bernard M. Palmer, however, finally consented to the sale of 75,000 shares of the stock held in the 1924 trust on the condition that the proceeds of the sale together with the remaining 25,000 shares of stock in the trust should continue to be held in trust under the same arrangements existing under the 1924 trust and in which the members of the Palmer family would retain the same respective interests as they then had, and all members of the Palmer family directly concerned agreed that the sale should be carried out on that basis. As heretofore shown, one provision of the 1924 trust was that no part of the Parker Pen Company stock held by the trust could be disposed of unless all of that stock was simultaneously sold or otherwise disposed of as part of the same transaction. In order that the sale might be carried out and the respective family interest remain the same as under the 1924 trust, it was necessary to terminate that trust, thereby releasing the stock from the restrictive provision as to sale, and create a new trust retaining for each member of the family the same beneficial interest as under the 1924 trust and having identical provisions except the restrictive provision relative to the sale of the Parker Pen Company stock. The 1924 trust was terminated by a document signed by the decedent, Bernard M. Palmer, and Horace L. Blackman, as trustees, and by the decedent, Bernard M. Palmer, and Florence P. Blackman, individually. This instrument was signed by Horace L. Blackman and Florence P. Blackman on November 23, 1928, in California, and by the decedent and Bernard M. Palmer

on November 26, 1928, in Wisconsin. After setting out the reasons for the termination of the 1924 trust, it provided as follows:

> Now, THEREFORE, we, the undersigned, being all of the persons who are now beneficiaries entitled to share in the income of the trust estate above mentioned, do hereby terminate said trust and trust estate and direct the distribution of the principal of said trust estate as follows:
>
> To Bernard M. Palmer an undivided one-half (½) thereof:
>
> To Florence P. Blackman an undivided one-half (½) thereof:
>
> and we direct the trustees to make all instruments of assignment and conveyance necessary or convenient to vest the title thereof in said Bernard M. Palmer and Florence P. Blackman each an undivided one-half (½) thereof.
>
> And said William F. Palmer, for and in consideration of valuable considerations to him in hand paid, the receipt of which is hereby acknowledged, does hereby waive any and all of his rights in and to said trust or trust estate and hereby consents and directs said trustees to convey the principal of said trust estate, and the whole thereof, to said Bernard M. Palmer and Florence P. Blackman each an undivided one-half (½) therein.

12. Immediately after the 1924 trust was terminated, as shown above, the 1928 trust was created. It was signed by Florence P. Blackman November 23, 1928, and by Bernard M. Palmer November 26, 1928. Under the terms of that instrument Florence P. Blackman and Bernard M. Palmer, as grantors, transferred the 100,000 shares of Parker Pen common stock and 1,500 shares of preferred stock of the same company, being all the stock held by the 1924 trust, to the decedent, Bernard M. Palmer, and Horace L. Blackman, as trustees under the 1928 trust. The terms of the 1928 trust were substantially the same as the 1924 trust except with respect to certain provisions in regard to the termination of the trust and the elimination of the restrictive provision relating to the sale of the Parker Pen Company stock, the income from the 1928 trust to be paid to the same parties as under the 1924 trust and other provisions

being similar. The 1928 trust contained the following provision with respect to its termination:

> The trust hereby created may, in the discretion of the Trustees, be terminated in advance of the expiration of the period for which the trust is to continue as provided in paragraph 3 hereof by and with the consent of all of the Trustees and all of the adult persons who at the time are beneficiaries entitled to share in the income of the trust estate.
>
> In the event of such termination, the principal of the trust estate shall be distributed among and paid and transferred to the persons who at the time of such termination are entitled to share in the income of the trust estate, and it shall be distributed among and paid and transferred over to them in the same proportions in which they were, immediately prior to such termination, entitled to share in said income.
>
> Any of the provisions herein contained relating to the trust estate may be at any time altered, changed, or amended by and with the consent of all of the Trustees and all of the adult persons who at the time are beneficiaries entitled to share in the income of the trust estate.

13. After the termination of the 1924 trust and the creation of the 1928 trust, as shown in the preceding findings, 75,000 shares of common stock of the Parker Pen Company were sold by the latter trust and the proceeds reinvested as a part of its corpus. Bernard M. Palmer severed his connection with the Parker Pen Company as of January 1, 1929. In or shortly prior to January 1929, the decedent likewise severed his connection with the Parker Pen Company and in January 1929 went to California where he continued to reside until the time of his death February 1, 1933. When the 1928 trust was created, William F. Palmer was seventy-three years of age and had suffered for some years with diabetes though up to that time that illness had not interfered with his work as an active officer of the Parker Pen Company. His death was ascribed to acute uremic poisoning.

14. As heretofore shown, the Commissioner valued the corpus of the trust at the date of the decedent's death at $2,411,914.21 and included one-half of its value in the decedent's gross estate under the provisions of Section 302

(c) and (d) of the Revenue Act of 1926, as amended. Claims for refund, assigning as a ground that the foregoing action was erroneous, were rejected by the Commissioner July 17, 1940.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The issue involved in these tax proceedings is whether the value of the interest of plaintiffs' decedent in a trust at the date of his death should have been included in his gross estate for estate tax purposes under the provisions of section 302 (d) of the Revenue Act of 1926 (44 Stat. 9, 71). Two trusts are involved, one created in 1924 and another in 1928. The issue turns on whether the trust created in 1928 constituted a new trust or whether the 1928 trust is to be considered in substance as a continuation of the 1924 trust and the issue determined as if the latter trust had not been canceled in 1928.

The plaintiffs are the daughter and son, respectively, of the decedent. In 1924 the decedent owned or controlled a one-half interest in the Parker Pen Company, and the other one-half interest was owned or controlled by George S. Parker. At that time the decedent created a trust (which will be referred to as the 1924 trust) and transferred to it his stock in the Parker Pen Company. He and his son and his son-in-law were the trustees. During the lifetime of the decedent the income from the trust was to be paid one-half to the decedent and one-fourth to each of the children, and upon the death of the decedent the income was to be paid one-half to each of the children with qualifications not here material. The trust was to continue until the death of the last survivor among his children, son-in-law, daughter-in-law and then living grandchildren unless terminated prior thereto as provided in the instrument. One method of termination was by consent of the trustees and the adult beneficiaries entitled to share in the income and another was by the sale of the Parker Pen stock which comprised the entire corpus of the trust. In the event of such termination, the principal of the trust was to be distributed among the indi-

viduals who were receiving its income and in the same proportion.

Another provision of the 1924 instrument was that no part of the Parker Pen stock owned by the trust could be sold unless all of it was simultaneously disposed of.

In 1928 a banking concern offered to purchase 75,000 of the 100,000 shares of the Parker Pen stock held by the trust. The decedent, his daughter, and her husband were willing to accept the offer. The son did not look with favor on the sale for the reason that he was afraid such a change of ownership of the Parker Pen stock might affect adversely the position he then held with the Parker Pen Company. He, however, finally consented to the sale on the condition that the proceeds of the sale and the remaining 25,000 shares of stock in the trust would continue to be held in trust under the same arrangement existing under the 1924 trust and in which the members of the Palmer family would retain the same respective interests. The decedent, his daughter, and his son-in-law agreed to that proposal. In order that the sale might be carried out and the respective family interests remain the same as under the 1924 trust, it was necessary to terminate that trust and create a new trust with the same provisions as to the respective family interests but with the restrictive provision as to the sale of the Parker Pen stock eliminated.

The 1924 trust was accordingly terminated by an instrument signed by the daughter and son-in-law on November 23, 1928, and by the son and the decedent on November 26, 1928, each party signing both individually and as trustee (when their interests so appeared). At the time of termination one-half of the income of the trust was being paid to the decedent and one-fourth to each of his children. Therefore, under the provision with respect to termination heretofore referred to, the three individuals were entitled to shares of the corpus in that same proportion. However, in lieu of receiving shares in that manner, the decedent waived his interest in the trust estate and joined the other parties in directing that the corpus of the trust be conveyed one-half to his daughter and one-half to his son.

Immediately upon the termination of the 1924 trust, a new trust (referred to for convenience as the 1928 trust)

was created with the same corpus, the same trustees, and with substantially the same provisions except the restrictive provision as to the sale of the stock and certain provisions in regard to the termination of the trust. Because of the direction in the termination agreement as to the distribution of the corpus of the 1924 trust and the parties to whom the corpus was conveyed, the son and daughter appeared in the new trust instrument as the creators of that trust instead of the decedent as in the case of the 1924 trust. However, the decedent, the son, and the daughter (as well as contingent beneficiaries) were entitled to receive shares of the income and, in the event of termination, to participate in the distribution of the corpus in the same manner in the case of both trusts, that is, the decedent was entitled to receive one-half of the income from the trust and upon termination one-half of the corpus, and the son and daughter were each entitled to their shares of one-fourth. The provision with respect to termination by and with consent of the trustees and adult beneficiaries remained unchanged.

Our first question is whether a new trust was created by the 1928 instrument. An affirmative answer to that question is inescapable. The 1924 trust provided for methods of termination prior to its expiration and one of those methods was availed of, namely, by agreement of the trustees and the adult beneficiaries. Upon termination, the 1928 trust was created without the provision which made the termination necessary in order to carry out a desired business transaction. That was an important substantive provision which bore a vital relationship to the corpus of the trust. After the creation of the new trust and the consummation of the sale, the trust no longer had a corpus consisting solely of stock of the Parker Pen Company which had to be disposed of as a unit but had a corpus consisting of miscellaneous assets which could be dealt with in the discretion of the trustees. Both in form and substance the 1928 trust was accordingly something different from the 1924 trust and, therefore, the property rights of the decedent in the 1928 trust which terminated with his death must be adjudged on the basis of that instrument.

Section 302 (d) of the Revenue Act of 1926, *supra*, provides that the value of the gross estate of a decedent shall

be determined by including the value at the time of his death of all property of which he has made a transfer "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *." The trust instrument created in 1928, after the passage of that act, was in full force and effect at the decedent's death in 1933 and thereunder the decedent had the right together with his son and daughter and his son-in-law to revoke the trust and upon such revocation he would have been entitled to receive one-half of the corpus. At his death, the decedent's rights in one-half of the corpus of the trust ended and that part of the corpus passed to members of his family as provided in the trust instrument. The Commissioner included the value of the decedent's one-half interest in the trust in his gross estate for estate tax purposes. Such action was clearly within the statute. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85.

The argument of plaintiffs that even if the 1928 trust is considered as a new trust the action of the Commissioner would nevertheless be erroneous for the reason that the decedent was not the settlor of the trust is without merit. When the 1924 trust was terminated, the decedent had the right to receive one-half of its corpus and each of his children was entitled to receive one-fourth, but instead of each of the parties receiving those respective amounts the decedent waived the receipt of his share and joined in the direction that the property be conveyed one-half to his son and one-half to his daughter. In connection with that conveyance, however, it had already been agreed that a further conveyance would also be made of that corpus, namely, a conveyance to a new trust in which the decedent would be entitled to receive one-half of the income and, in the event of its termination prior to its expiration date and during his lifetime, the decedent would be entitled to receive one-half of the corpus. While the decedent did not therefore make a transfer of the property to the 1928 trust, he caused others to make a transfer in such a manner that he retained a valuable interest therein. It is well established that the per-

son who furnishes the consideration for the creation of a trust is the settlor even though in form the trust is created by another. *Lehman* v. *Commissioner*, 109 Fed. (2d) 99, certiorari denied 310 U. S. 637; *Buhl* v. *Kavanagh*, 118 Fed. (2d) 315.

It accordingly follows that both petitions should be dismissed. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

ADRIAN D. JOYCE v. THE UNITED STATES

[No. 45734. Decided February 1, 1943]

On Defendant's Plea to Jurisdiction

Jurisdiction under section 154 of the Judicial Code; suit pending in another court on same cause of action.—Under the provisions of section 154 of the Judicial Code (U. S. Code, Title 28, section 260) prohibiting the prosecution in the Court of Claims of any claim for, or in respect to, which claim the claimant has pending in any other court any suit against a person who at the time the cause of action arose was acting or professing to act in respect thereto under the authority of the United States; the defendant's plea to the jurisdiction of the Court of Claims is sustained and the petition of plaintiff is dismissed.

Same; allegations of the plea taken as confessed under the rules of the court.—Under Rule 83 (c) of the Court of Claims, a copy of defendant's plea having been mailed to plaintiff's attorney, raising a presumption of service, and no reply having been received; and under Rule 86 the case having been placed on the law calendar for hearing, and no appearance having been made on behalf of plaintiff; it is *held* that the allegations of the plea must be taken as confessed.

Messrs. H. J. Crawford, Roger Hinds, John A. Duncan, and *Squire, Sanders & Dempsey* for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant.

The facts sufficiently appear from the opinion *per curiam*, as follows:

The plaintiff sues to recover income taxes alleged to have been erroneously collected for the year 1934. The defendant on September 16, 1942, filed a plea alleging

that at the time this suit was filed and ever since there has been pending against Frank F. Gentsch, Collector of Internal Revenue at Cleveland, Ohio, a suit on the same cause of action and that when the cause of action arose the said Gentsch was acting under the authority of the United States. It, therefore, asks that this suit be dismissed.

Copy of this plea was mailed plaintiff's attorneys on September 16, 1942, which raises a presumption of service (Rule 83 (c)), and no reply thereto has been made. The case was placed on the law calendar for hearing on the plea under rule 86, but the plaintiff did not appear when the case was called. The allegations of the plea, therefore, must be taken as confessed.

Section 154 of the Judicial Code prohibits the prosecution of a suit in this court while there is pending in any other court a suit against a person who at the time the cause of action arose was acting or professing to act in respect thereto under the authority of the United States. The defendant's plea is sustained and this suit, therefore, must be dismissed. It is so ordered.

ARNOLD M. DIAMOND v. THE UNITED STATES

[No. 45418. Decided March 1, 1943]

On the Proofs

Government contract; extra work done without written order from contracting officer.—Where contractor uses a method of performing his contract, not authorized thereby, and fails to secure an order in writing therefor, required under the terms of the contract, he cannot recover for the extra cost involved.

The Reporter's statement of the case:

Mr. Frederic N. Towers for the plaintiff. *Mr. Norman B. Frost* was on the brief.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. March 31, 1939, plaintiff entered into contract with the defendant to furnish all labor and materials required

for certain miscellaneous betterments at the United States Assay Office (New), 32 Old Slip, New York City, in strict accordance with specifications, schedules, and drawings for the consideration of $26,400.00. The contract and specifications are plaintiff's Exhibit 1, and made a part of these findings by reference.

The contracting officer for the United States was W. E. Reynolds, acting Director of Procurement, Treasury Department.

2. Part of the work consisted of cleaning and pointing the exterior of the building and approaches, and this work in turn involved two operations: *First*, exterior cleaning of stone work by wet sand blast process, and, *second*, removing stains from exterior stone wall surfaces. Sand blasting cleans stone but does not remove stain. The sand blast cleaning done by plaintiff was satisfactory in all respects and was accepted by defendant.

3. Paragraph 9 of the specifications reads as follows:

> REMOVING STAINS: Stains shall be removed as follows:
>
> (A) Thoroughly wet the stone to be treated before applying the acid.
>
> (B) Apply with a fibre brush a solution of 85% phosphoric acid composed of one part acid to four parts water.
>
> (C) Keep the stone wetted with this solution until the stain disappears. This time will vary from 15 to 25 minutes, depending upon the depth of the stain.
>
> (D) Wash thoroughly with a hose to remove all acid.

4. The United States Assay Office is a stone structure in which smelting processes are carried on. Gold is separated from baser metals, electrolytically, and for this separation nitric and hydrochloric acids are used as a solvent. The windows of the building were protected by steel bars, which bars had been attacked by the acids from the separation process resulting in the formation of iron nitrate and iron chloride, which, when washed down the face of the building by rain, or otherwise, had penetrated the stone beneath the windows and produced peculiar yellow stains.

5. Plaintiff proceeded with the work in strict accordance with procedures outlined in Paragraph 9 of the specifica-

tions, set out in finding 3, and in that manner, at the direction of defendant's inspector, prepared a sample of stone so cleaned. It was found that the phosphoric acid mentioned in the specification had almost no effect in removing stains from the stone and the inspector directed plaintiff to use some other method. The inspector suggested to plaintiff that he experiment with several samples of various acids in order to determine the acid that would do the job best. Experiments were made accordingly, and hydrofluoric acid (instead of a solution of phosphoric acid as provided by specifications) was found by plaintiff as most suitable for removing stains.

6. After experiment with samples of various acids referred to in finding 5, it was suggested by defendant's inspector that plaintiff submit a letter to the Treasury Department requesting permission to use hydrofluoric acid. On May 15, 1939, plaintiff wrote a letter addressed to Procurement Division, Public Buildings Branch, Washington, D. C., as follows:

> I propose, in lieu of the method specified, to clean the exterior stonework of the building, by means of steam cleaning.
> This will provide the use of a mild Hydrofluoric acid (% about 4) followed by a blast of steam.
> This work done by the above method will be more satisfactory and I propose to do it at no additional cost to the Government.
> Please advise if this is satisfactory.

May 22, 1939, in a letter, defendant replied in part that "no change of method was desired, except that dilute hydrofluoric acid may be used on the stains in lieu of the phosphoric acid which is specified."

7. Plaintiff wet all stained stone surfaces thoroughly, applied with a fibre brush a solution of hydrofluoric acid of the strength outlined in his proposal of May 15, 1939, keeping the stone wetted by repeated applications with this solution from 15 to 25 minutes. Plaintiff then washed stone surfaces thoroughly to remove all traces of the acid, thus fully complying with specification requirements except that, as permitted by defendant in its letter of May 22, 1939, hydrofluoric acid was used in lieu of phosphoric acid.

8. This procedure resulted in cleaning the building more satisfactorily than had been accomplished through use of

phosphoric acid as the cleaning agency, but the job was still unsatisfactory; and when the building was finally inspected defendant's construction engineer suggested that plaintiff experiment further and submit a proposal for the removal of the iron stains still appearing under the windows.

9. Plaintiff experimented further and devised a method for cleaning the stains, thereafter submitting a proposal to defendant's construction engineer in a letter dated June 15, 1939, which reads as follows:

> Reference is made to the areas under the windows from the fourth floor down, on the east end of the Old Slip side of the building, and under the windows on the South Street side of the building, which although cleaned and treated as required by the contract, still show the staining caused by the action of the acids on the old windows.
>
> For the sum of Five Hundred and Sixty Five Dollars ($565.00) I propose to do the following work at these areas:
>
> a. cover the windows as required to protect the glass.
>
> b. treat with 8% hydrofluoric acid and wash off after 1 minute.
>
> c. treat with 85% phosphoric acid, diluted one part acid to four parts water, and wash off after 20 minutes.
>
> d. repeat treatment (b).
>
> Special care will be taken to use sufficient water to remove the acid.
>
> Kindly advise if this meets with your approval.

10. The method and materials so devised and recommended in the foregoing letter were different from the specification requirements set out in finding 3. Plaintiff's proposal to do the work in accordance with the method outlined in that letter was rejected by defendant's construction engineer in a letter dated July 18, 1939, the last paragraph of which reads as follows:

> You are hereby directed to proceed with this work in accordance with the specification covering your contract.

July 31, 1939, plaintiff wrote a letter to defendant's supervising engineer in Washington, D. C., in which he took issue with the decision of July 18, 1939, and in closing stated, "I wish to protest that I consider this additional work, and believe that I should be compensated for doing it."

11. August 11, 1939, defendant's supervising engineer wrote a letter to plaintiff, the third paragraph of which reads in part as follows:

> Since the specifications call for * * * treating of the exterior stonework by the specified method until stains disappear, additional compensation cannot be allowed for this work which is a part of the contract requirements.

12. August 22, 1939, plaintiff wrote a letter to defendant's supervising engineer asking that the matter be reviewed. November 22, 1939, defendant's supervising engineer wrote a letter to plaintiff refusing to reconsider the matter.

13. Except as hereinbefore stated, no other or further action was taken by either plaintiff or defendant regarding the dispute over the work which plaintiff proposed in his letter of June 15, 1939, set out in finding 9. The work as proposed in that letter was performed by plaintiff with defendant's knowledge, and the defendant received the benefit thereof. The additional cost of this work to plaintiff is shown in the next finding.

14. On account of the work thus performed by plaintiff, he was required to pay a subcontractor $500, which represents actual cost of the work. This amount also represents the reasonable value of the work. Plaintiff claims a profit of 10%, plus bond premium paid of $9.00, or a total of $559.00. No part of the amount so claimed by plaintiff has been paid him by defendant.

15. Article 5 of the contract provided:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

On March 31, 1939, plaintiff entered into a contract with the defendant to furnish all labor and materials required for certain betterments at the United States Assay Office in New York City. A part of the work called for in the contract was

the cleaning of stains from the exterior stonework of the building.

Paragraph 9 of the specifications provided a method for cleaning the stone. In this method phosphoric acid was to be used but it was found that this was not satisfactory. Experiments were conducted and plaintiff was allowed, at no additional cost to defendant, to use a solution of hydrofluoric acid in lieu of the phosphoric acid. The hydrofluoric acid method was not entirely satisfactory and plaintiff requested of the defendant permission to clean the stone by a different method at a cost of $565.00. The construction engineer refused to grant a change in the contract and plaintiff then took the matter up with the supervising engineer requesting compensation for extra work but the supervising engineer confirmed the decision of the construction engineer. No further action was taken about a change but the plaintiff went ahead and cleaned the stone exterior of the building by the method outlined in finding 9.

Article 3 of the contract provided for changes stating that all changes over $500 had to be approved in writing by the head of the department. No change was approved in writing by the head of the department.

Article 5 of the contract provides as follows:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

The removal of the stains was part of the contract and the method to be used was provided Resorting to another method without a written change order was not within the terms of the contract and no liability resulted.

See *Plumley* v. *United States*, 226 U. S. 545; *Pope* v. *United States*, 76 C. Cls. 64, 96, 99; and *Griffiths* v. *United States*, 74 C. Cls., 245, 256, 257.

Plaintiff is not entitled to recover and his petition is dismissed.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, took no part in the decision of this case.

Syllabus

GRIER-LOWRANCE CONSTRUCTION COMPANY, INCORPORATED v. THE UNITED STATES

[No. 43640. Decided March 1, 1943]

On the Proofs

Government contract; construction of special jurisdictional act; legal and equitable bases of Government responsibility not to be disregarded.—Under the provisions of the special act (50 Stat. 955) conferring jurisdiction upon the Court of Claims to hear the instant case to judgment, plaintiff's claim "to be adjudicated upon the basis of all losses or damages suffered" by plaintiff "duly found to be due to acts of the Government or delays caused by the Government or subsurface conditions unknown to the contractor and not disclosed by the Government before the contract was entered into"; it is *held* that it was not the intention of Congress, in the enactment of said act, that the Court should disregard all legal and equitable bases of liability and merely trace the relation of cause and effect between rightful and proper conduct on the part of the Government or risks contracted for by plaintiff and paid for by the Government, and "losses" suffered by plaintiff as a consequence thereof.

Same.—Whether the "acts of the Government" or "delays caused by the Government" were rightful or wrongful is not immaterial under the provisions of the jurisdictional act.

Same; conditions unknown; failure to disclose.—Absence of disclosure by the Government of "subsurface conditions unknown to the contractor" is not a ground of recovery under the provisions of the jurisdictional act where the Government not only did not know, but had no duty to know, such conditions; and where the plaintiff by the exercise of prudence could have known such conditions, having by the terms of the contract assumed the risk of such variations in the conditions of the work as actually were encountered.

Same; waiver of time limit on claim.—Where with respect to certain items of its claim, which were denied by the contracting officer, plaintiff did not file a written protest with the contracting officer within the time specified in the contract; it is *held* that this provision of the contract was waived by the contracting officer when he accepted the said claims after the work was completed and considered them on their merits.

Same; no appeal possible.—Where the contracting officer was also the executive officer of the Commission which made the contract; it is *held* there could be no appeal to the "head of the department" as provided in the contract.

Same; ambiguous drawing; no estoppel by admission of claimant's error.—Where it is found that the contract drawing with respect to the location of certain piles was ambiguous; and where a layout of the proposed location of the piles was made by plaintiff

and presented to the contracting officer who did not discover any mistake and did not disapprove said layout; and where, after the discovery of an error in locating the piles according to said layout, plaintiff's superintendent admitted its mistake and requested to be allowed to correct it in the most inexpensive way, without removing the piles erroneously located; and where thereafter nothing occurred which would give rise to any estoppel against plaintiff because of this admission of its superintendent; it is *held* that plaintiff is entitled to be compensated for correcting a condition caused by the defendant's mistake.

Same; rights of parties not affected by consultation and advice by contracting officer.—Where the contracting officer, at plaintiff's instigation, consulted with and advised with plaintiff as to the most economical method of certain phases of the work; it is *held* that such consultation and advice did not affect the rights of the parties under the contract.

Same; contemporaneous construction of contract not shown.—The fact that in one instance under the contract the defendant "after a long contest" finally paid plaintiff an additional amount claimed does not show a contemporaneous construction of the contract such as to vary what the contract seems to say on its face.

Same; delays by Government; undisclosed conditions.—Where plaintiff made certain claims based on increased expenses alleged to to be due to defaults of the Government, causing delays in performance, and to difficulties and delays arising from excessive water encroaching upon the work and to unstable subsurface conditions; it is *held* that plaintiff was not so delayed by the Government in the performance of its contract, and plaintiff did not encounter, to any appreciable degree, subsurface conditions unknown to plaintiff and not disclosed by the Government, and plaintiff accordingly is not entitled to recover.

Same; deduction for defective work after acceptance of job.—Where, after plaintiff's work had been accepted, the defendant deducted $2,842.50 from plaintiff's contract price as reimbursement for work done by another contractor to repair an alleged defective condition for which defendant claimed plaintiff was responsible; it is *held* that to justify such deduction, after plaintiff's work had been accepted, the burden of proof as to plaintiff's responsibility for such defects was on the defendant, and in the absence of such proof plaintiff is entitled to recover.

Same; liquidated damages.—Where it is found that plaintiff was not, beyond the time allowed it, delayed in completing the work by any cause for which the defendant was responsible, or by any cause which was, under the contract, an excuse for late completion; it is *held* that the assessment of liquidated damages for late completion was, therefore, what plaintiff had agreed to, and the additional overhead for the period of delay was not the responsibility of the Government; and plaintiff accordingly is not entitled to recover.

The Reporter's statement of the case:

Mr. M. Walton Henry for the plaintiff. *Mr. Louis A. Spiess* was on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Rawlings Ragland* and *Mr. S. R. Gamer* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a North Carolina corporation with its principal place of business at Statesville, North Carolina. August 26, 1937, it filed its petition herein pursuant to a special Act of Congress of May 6, 1937.

2. March 25, 1929, the defendant through U. S. Grant 3d, Executive and Disbursing Officer, Arlington Memorial Bridge Commission, issued an advertisement for sealed bids to be received until 11 a. m., April 17, 1929, when they would be publicly opened, for furnishing all labor and materials and performing all work in connection with the construction of the foundations for the several structures comprising the Bridge Plaza and Water Gate of the Arlington Memorial Bridge project as more fully described in specifications attached thereto.

The site of the proposed work ran parallel to and within a few feet of the Potomac River, which is a tidal stream. Certain excavation and foundation work extended into the river bed and required the construction of a cofferdam. Concrete piles, foundation piers, and cylinders were required to be driven to or rest upon the underlying bedrock, which lay at elevations between 30 and 40 feet below the mean low water level of the river, and the pits into which was to be placed reinforced concrete for piers and cylinders had to be dug to a depth that would expose the bedrock.

Before submitting its bid plaintiff's vice president conferred with a Government representative who supplied him with all information within his knowledge or shown by his records concerning soil conditions and depth of bedrock. Plaintiff dug no test pits, nor did it take any other independent step to inform itself concerning subsoil and subsurface conditions at the site of the proposed work.

Paragraph 10 of the specifications provided:

> 10. *Bidders to visit site.*—Bidders are expected to visit the site of the work and to inform themselves as to all existing conditions. They are expected to examine the work already in place and to familiarize themselves as to the progress and schedules of all work which may be under way or contemplated, such as the construction of the main bridge, proposed dredging operations at or near the site of the work, etc. Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials, and performing all work required for the completion of the contract in conformity with the specifications.
>
> No allowance will be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work.

3. Paragraphs 46, 48, and 49 of the specifications, a copy of which was attached to the invitation for bids, relating to the subsoil and bedrock conditions at the site of the work, provided:

> 46. *Subaqueous constructions.*—The methods by which the contractor proposes to carry out the subaqueous work may be of his own choosing and design, provided they fulfill the requirements of this paragraph and otherwise permit the work to be carried out in accordance with these specifications.
>
> The method elected shall be such as to expose the entire surface of the bedrock to be covered by the concrete, to permit the inspection of the same in the dry, and to permit the placing of all concrete in the dry. Cofferdams, if used, shall be large enough to leave a clearance of 1 foot 6 inches on all sides of the concrete. No concrete shall be poured against the sheeting of the cofferdams except with permission from the Contracting Officer in each case. No wood posts, braces, or wale pieces shall be left in the construction as the concreting is carried upward, except with the permission of the Contracting Officer.
>
> The casings for the cylindrical posts need not be larger than the clear dimension called for on the drawings; otherwise the founding of these cylinders shall conform to the requirements of the above paragraph. The contractor will be allowed to vary the size and shape of these cylinders and to select for himself the

type and the materials of the same, provided that the shape used shall circumscribe the cylinder, as shown on the drawings. Each cylinder shall be straight, and its position when finished shall at no point of its length be more than 3 inches away from its correct position.

Each bidder shall submit with this proposal a complete description of the methods and of the constructions which he proposes to use for the subaqueous work. This description shall be complete enough in detail to afford the Contracting Officer sufficient information upon which to judge the adequacy of the method and constructions proposed.

Before the work of construction is begun the Contractor shall submit complete detailed descriptions and drawings of the cribs, cofferdams, or caissons which he proposes to use, the general design of which was approved at the time of the acceptance of the Contractor's bid. These detailed descriptions and drawings will be returned to the Contractor bearing approval, or with such corrections and changes indicated thereon as the Contracting Officer may consider prudent. In the latter case, descriptions and drawings shall be resubmitted until approval is obtained.

The Contractor shall be solely and entirely responsible for the safety and sucess of the methods and constructions which he proposes to use for carrying out the subaqueous work, even though the same be approved by the Contracting Officer; and in case of any failure of any of the Contractor's methods or constructions or of any accident to them or to the uncompleted work, the Contractor shall employ such other methods and do whatever may be necessary completely and satisfactorily to finish the work without additional cost to the United States.

48. *Subsoil conditions and surface of bedrock.*—The following statements of this paragraph are made for the information of bidders but without responsibility on the part of the United States.

From experience with wash borings, test pits, and excavations for the foundations of the Arlington Memorial Bridge and for the underpinning of the terrace wall around the Lincoln Memorial, the earth to be excavated for the foundation work covered by this contract is believed to be a dark blue river silt, weighing from 100 to 105 pounds per cubic foot, overlaid for a depth of from 4 to 12 feet with recently made fill, consisting for the most part of yellow clay, although a variety of foreign substances, such as brick bats, broken

concrete, ashes, etc., are to be expected at places in this top stratum. Observations made during the operations mentioned above indicate that the underlying silt is generally free from obstacles to excavating operations; and also that while this silt is not itself water-bearing, there are occasional seams and fissures from which water finds its way into excavated openings. The silt has been found to be somewhat tough and cohesive and to stand on an unsupported vertical surface for a reasonable time after an opening has been made.

The surface of the bedrock as exposed in the piers and abutments of the Arlington Memorial Bridge is in certain areas smooth and gently undulating, but becomes quite irregular at other places—abrupt variations in depth of five feet or more having been found within small horizontal distances. Sometimes the deeper pockets between the high places of the rock are filled with dense sand or pebbles. The surface has been found in general to be a good one for bonding with the concrete, and but little dressing has been found necessary in foundations already placed.

The probings and wash borings shown on drawing OEO-9 were carried out for the Arlington Memorial Bridge by personnel and equipment of the U. S. Engineer Office, Washington, D. C. The latter organization made the borings and probings for the Arlington Memorial Bridge foundations and these were found to be quite accurate.

Although the borings shown on the drawing just mentioned are believed to be generally accurate and reliable, the Contracting Officer assumes no responsibility as to their accuracy, either in depth or position, and any inaccuracies which may be found to exist in these borings shall not be made the basis for any claim for extra work or damages resulting from the use of the information shown on the drawing, except as explicitly provided for in paragraph 34.

49. *Excavation and exposing surface of bedrock.*—The Contractor shall excavate and unwater the cribs, cofferdams, or caissons, shall maintain these constructions in a state of safety and good repair, and shall do all pumping necessary to keep them dry.

The Contractor shall also remove all mud, dirt, and unattached rock up to one-half cubic yard in size, in order that a thorough inspecton of the surface of the bedrock may be made by the Contracting Officer.

The cost of all work described in this paragraph shall be borne by the Contractor, and shall be included in the price bid for the work.

4. Plaintiff's bid was accepted and on May 18, 1929, the United States by U. S. Grant 3d, Executive and Disbursing Officer, Arlington Memorial Bridge Commission, and plaintiff by its president, Fred Lowrance, entered into a contract under which plaintiff agreed to furnish all labor and materials and perform all work required for the construction of the foundations for the several structures comprising the Bridge Plaza and the Water Gate of the Arlington Memorial Bridge project, Washington, D. C., for the consideration of $328,700, and any additional work required by the contracting officer was to be performed at the unit prices specified therein. The work required of plaintiff included furnishing all labor and materials for clearing the site of the work of trees, buildings, underground water pipes, conduits and other obstructions; digging trenches along the parkway approach and at the site of the water gate; digging and cribbing 82 pits or wells, into which reinforced concrete for cylinders and foundation piers was to be placed; constructing cofferdams around areas where work was to be carried on within or near the limits of the river bed, where seepage of water might be expected; bulding wooden forms for and casting and driving 576 reinforced concrete piles; driving several thousand feet of sheet piling, both wood and steel; and tearing out and reconstructing a large sewer which intersected the site of the work.

The contract provided that "work shall be commenced within thirty (30) calendar days after date of receipt of notification by contractor of signing of contract by contracting office—i. e., June 24, 1929—and shall be completed in One Hundred Eighty (180) calendar days after said date of receipt of notification, namely, November 21, 1929." The contract, together with the specifications accompanying it, is of record as Plaintiff's Exhibit 2 and is made a part hereof by reference.

Plaintiff's equipment was on the site of the work May 21, 1929, although plantiff did not receive notice to proceed until May 25. Work under the contract was completed June 21, 1930, two hundred and twelve (212) days after the contract completion date, for one hundred and thirty-three

(133) days of which plaintiff was assessed liquidated damages at the rate of $100 per day, or $13,300.

5. Paragraph 44 of the specifications provided that plaintiff should (a) submit to the contracting officer immediately after the signing of the contract a written outline of its program of construction and layout of its plant, and, after approval of this outline by the contracting officer, submit a time schedule indicating the progress to be maintained on each of the various parts of the work, and (b) finish the foundations of the sea wall, the lower and main steps, and the plaza and wing walls during the first part of the working time, in order that contracts for the superstructures might be let to others. June 13, 1929, the defendant wrote plaintiff calling attention to its failure to furnish the required time schedule to the contracting officer, and advising plaintiff that it was particularly anxious that plaintiff concentrate on three structures, to wit, the sea wall, and the lower and main steps. June 29 plaintiff furnished its time schedule to defendant and it was approved by the contracting officer July 19, 1929.

June 10, plaintiff began excavation of a trench at the north end of the parkway approach, some distance from the sea wall and steps work, which was initially required by the specifications and requested by the defendant. Plaintiff continued this trench work until August 6.

6. Many years ago a sea wall, about 10 feet in width and a few feet in depth, consisting of stones or riprap, was constructed on top of the Potomac River flats along what was then the shore line, for the purpose of preventing wave action on the bank. The flats were used as a dumping ground for refuse, and rubbish had been deposited on top of the wall until it was covered to a depth of several feet. This wall crossed the parkway approach trench for a distance of about 50 feet. Plantiff's steam shovel removed the stones when it reached the point of intersection, and the small amount of stone thus removed did not delay plaintiff to an appreciable extent in the final completion of the contract work. The stone was located in the upper stratum as described in paragraph 48 of the specifications and was excavated with little difficulty.

The upper stratum of the site of the work to a depth ranging from 4 to 12 feet consisted of an accumulation of brickbats, broken concrete, ashes, and other refuse as generally described in paragraph 48 of the specifications. A previous contractor had constructed a spur railroad track from Georgetown along the river front to the Lincoln Memorial, which was used for the purpose of transporting building material to the site of that Memorial. Cinders had been used to ballast the track. On the completion of the Lincoln Memorial building, the ties and rails were removed but the cinder ballast of the track bed was not removed. This railroad track intersected for a short distance the area within which plaintiff was required to drive piles and entered the location of the underpass where pits were to be dug for a distance of approximately 50 feet. The cinders did not materially hinder the progress of the steam-shovel men and well diggers employed by plaintiff to excavate the trenches and dig the cylinder and pier pits, or otherwise substantially delay the final completion of plaintiff's contract work, though they did interfere to some degree with the driving of a few piles.

The contracting officer at the time plaintiff's contract was entered into had no knowledge of the existence of the remains of the railroad ballast nor of the old sea wall. There was no reason to know or duty to know of their existence, on the part of the contracting officer or the defendant.

7. The specifications provided for the digging and cribbing of 82 pits to bedrock, in which reinforced concrete for cylinders and piers was to be placed, and also for the tearing out and reconstruction of an old sewer known as the Easby Point sewer, which crossed the site of the contract work. Only a small number of the pits had been dug by November 21, 1929, the completion date fixed by the contract, and, due to delay in the delivery to plaintiff of reinforcing steel, little work had been done on the cylinder or pier concrete. As late as March 6, 1930, plaintiff was still engaged in excavating pits, building cribbing and forms, pouring concrete and placing reinforcing steel therein for the piers located in the underpass. Excavation and concrete work on the underpass cylinders was continued during April 1930. Excavation

and concrete work on the parkway approach piers was being carried on as late as March 31, 1930. Plaintiff did not begin work on the reconstruction of the Easby Point sewer until March 17, 1930, when it erected a platform, following which forms were built, concrete was poured, and the final bricking up was completed May 13, 1930, nearly six months after the completion date under the contract.

8. Plaintiff subcontracted with the Knoxville Iron Works of Knoxville, Tennessee, to supply the reinforcing and other steel needed. Early in June 1929, plaintiff commenced constructing wooden forms for casting the 576 concrete piles, which constituted the greater portion of the total concrete work required under this contract. Deliveries on the steel lagged from the beginning. No pile reinforcing steel was delivered in June; 63,518 of the 328,000 pounds of reinforcing steel required were delivered during July; none was delivered during August, and only 111,244 pounds in September. By October 1, 1929, only about 50 percent of the reinforcing steel had been delivered.

September 7, 1929, Major J. C. Mehaffey, Corps of Engineers, Executive Assistant to the Contracting Officer, wrote plaintiff as follows:

> In connection with the conference which we had with your Mr. Grier and Mr. Saddler in Mr. Nagle's office on August 26th, relative to the delay in the progress of your work to the present, and the proposed acceleration, I notice that you have not yet provided us with a revision of the progress schedule provided for by Paragraph 44 of the specifications, and I take this opportunity to request that you submit this revision at your earliest convenience.
>
> In this connection, I also regret to advise that such casual observations as I have made to date do not indicate any particular improvement in your rate of progress, and I think it desirable to confirm the representations which Mr. Nagle and I made to you on the occasion of our conference concerning our desire that your work on the Sea Wall, the Lower Steps, and the Main Steps be completed with all possible expedition, so that the work on the superstructures of these features, award of which will be made in the very near future, can proceed without delay or retardation due to the foundation operations.

September 20, 1929, plaintiff replied in part as follows:

> We did not answer your letter of September 7th pending a more thorough investigation into our inability to comply with the amended schedule as agreed in your office some weeks ago. Mr. Sadler is quite conversant with the circumstances, and we have asked him to rearrange the schedule to your satisfaction, which we take it has been or is being done. The reinforcing steel has been no end of trouble to us and we think has caused, in so far as we are able to determine, all of our delays.
>
> * * * * *
>
> We feel that we now have enough materials on the job to really prosecute the several undertakings with diligence and with profitable results, and believe that from now on we can in a measure reclaim the time lost.

The driving of concrete piles began September 30, 1929, when two of the total of 576 piles called for under the contract were driven. By November 21, 1929, the completion date under this contract, plaintiff had driven only 270 piles, and it continued driving piles for the parkway approach as late as April 28, 1930. During October and December 1929, and January 1930, plaintiff's subcontractor made deliveries sufficient to make the rest of the 328,000 pounds of pile reinforcing steel required.

9. Article 3 of the contract provided:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute

shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

A schedule setting out in detail the extra work authorized by defendant on the bridge plaza and water gate foundations is of record as Defendant's Exhibit 12 and is made a part hereof by reference. The contracting officer allowed plaintiff 28 days' extension of time for extra work in driving sea wall sheet piling and steel sheet piling in the parkway approach, costing $7,320, and 34 days for the other extra work. The Comptroller General added 17 days for the defendant's delay in approving the progress schedule referred to in finding 6, a total of 79 days. The total cost of the extra work was $70,192.28, which included $1,427.07 for the rental of a crane. None of the changes ordered by defendant prior to November 21, 1929, prevented plaintiff from completing the original contract work on time. No change ordered after November 21, 1929, delayed plaintiff's work more than the additional time allowed by the contracting officer.

During the progress of the work plaintiff made no claim, protest or objection in writing to the contracting officer concerning subsurface conditions until May 13, 1930. What oral discussion there had been before that time or what it related to, has not been proved. Factors contributing to the delays encountered by plaintiff were the delay of plaintiff's subcontractor in supplying reinforcing steel when needed for the casting of concrete piles and the pouring of concrete cylinders and piers, plaintiff's lack of adequate equipment and insufficient number of workmen, and lack of good judgment and proper coordination in the execution of the work.

It has not been proved that the "greater portion of the additional work ordered by defendant was due solely to the unexpected and unforeseen subsurface condition" at the site of the work.

10. After completion of the work on June 21, 1930, plaintiff presented a bill to the defendant for the balance of the contract price and some other items. July 22, 1930, plaintiff

wrote the contracting officer asking that final payment on the contract be expedited. August 1, 1930, the contracting officer replied, disallowing some of the items of plaintiff's bill, advising plaintiff that certain deductions hereinafter referred to in finding 21 were being made, stating that the amount of liquidated damages to be deducted had not yet been determined, and advising plaintiff that its signing of the voucher which would be presented to it would not be a waiver of disallowed claims. September 4, 1930 plaintiff wrote nine separate letters to the contracting officer presenting arguments in support of its claims. These letters are of record as Plaintiff's Exhibits 8-LL, 8-RR, 8-SS, 8-VV, 8-XX, 9-B, 9-D, 9-G, and 9-I and are made a part hereof by reference. These letters were acknowledged October 29, 1930. February 11, March 2 and March 4, 1931 plaintiff wrote additional letters and memoranda in support of its claims. These letters and memoranda are of record as Plaintiff's Exhibits 7-Q, 8-ZZ and 9-M and are made a part hereof by reference.

11. June 30, 1931, the contracting officer wrote a detailed communication to the Comptroller General about plaintiff's claims, recommending adversely to plaintiff's contentions, except with reference to 17 days delay in approving plaintiff's time schedule. He recommended that plaintiff be excused from liquidated damages for 17 additional days on this account. The Comptroller General paid plaintiff on the basis of the contracting officer's recommendations.

12. In the instant suit plaintiff claims that it suffered damages by reason of acts of defendant, delays caused by defendant, and subsurface conditions unknown to plaintiff and not disclosed by defendant before the contract was entered into, as follows:

1. Making and driving sixteen extra concrete piles—main steps:		
11-15" piles—46' long, 506 l. f. at $3.00	$1,518.00	
5-18" piles—46' long, 230 l. f. at $4.00	920.00	
		$2,438.00
2. Extra concrete, due to extra depth footings—main steps: 118.8 cubic yds. at $19.00		2,257.20
3. Extra concrete, due to piles driven out of position—main steps: 24.5 cubic yds. at $19.00		465.50

4. Jetting cylinders in place—parkway underpass	$315.43
5. Straightening concrete piles—parkway approach	2,070.49
6. Hauling and dumping earth from foundation piers—parkway approach	3,765.88
7. Additional length required to cast on piles, above the lengths given in the specifications: 15" piles—893 l. f. at $3.00 $2,679.00 18" piles—741 l. f. at $4.00 2,964.00	5,643.00
8–12. Excess cost on sea wall, wing walls and plaza wall, parkway underpass, parkway approach, Easby Point sewer construction	91,840.85
13. Charged to plaintiff by Comptroller General for repairs to concrete piles	2,842.50
14. Liquidated damages	13,300.00
15. Administration and office overhead for 150 days	8,159.10
Total	133,097.95

These items are considered in the following findings.

13. *Item 1. Making and driving sixteen extra concrete piles, main steps, 2,438.00.*—Because of an ambiguity in the contract drawings, plaintiff's employees made a lay-out of the locations where plaintiff proposed to drive certain concrete piles, which lay-out placed some of the piles two feet away from where the defendant wanted them. The lay-out was a not unreasonable interpretation of the contract drawings. The lay-out was presented to the defendant's inspector, and he did not discover the mistake or disapprove the lay-out. Plaintiff then drove the piles according to the layout. They were intended to be driven in groups of five, four in a square and a fifth in the center of the square. A concrete footing, was intended to be poured resting on the five piles, and a pillar was intended to rest on the footing. The pillars were not included in plaintiff's work.

After several groups of the piles were driven, the mistake became apparent. It took a long conference to determine how the mistake had been made. Then plaintiff's Superintendent Sadler called at the contracting officer's office, admitted the mistake, and requested that plaintiff be allowed to remedy it in the least expensive way. The contracting officer permitted plaintiff to place one additional pile in each group, so located that a larger concrete footing, resting on that pile and the others, would be properly centered for the

pillar. In correcting the mistake sixteen extra piles were made and driven by plaintiff which, at the unit prices fixed in the contract, were worth $2,438.00. The resulting work was no more valuable to the defendant than the work would have been without the extra piles, if the original piles had been driven where the defendant intended them.

14. *Item 2. Extra concrete, $2,257.20.*—This item covers 118.8 cubic yards of extra concrete in the main steps, due to the extra depth of footings placed on top of piles which, when driven to bed rock would have had to be spliced to bring their tops up to the regular depth of the footings. The last paragraph of specification 34 reads:

> The Contractor shall, however, be solely and entirely responsible for the sufficient length of each individual pile; and he shall pull out and replace, or splice (if splicing be permitted for that case), any pile which after being driven is found to be too short to permit cut-off at the proper level and, in the case of concrete piles, the exposure of the required length of reinforcing steel for dowels.

The third paragraph of specification 48 is quoted in finding 3 and is relevant here.

The defendant did not instruct plaintiff to pour this additional concrete. On its own request plaintiff was permitted to pour it. Plaintiff would have been authorized to splice the piles had it chosen to do so, but it preferred to place the additional concrete rather than to splice the piles, because the latter operation would have been more costly.

15. *Item 3. Extra concrete, $465.50.*—This is the extra concrete used to enlarge the footings described in finding 13, to make them include the extra piles which plaintiff drove because of the ambiguity in the contract drawings. The amount of extra concrete was 24½ cubic yards, and the unit priced fixed in the contract for extra concrete was $19 per yard. The product of these two figures is $465.50. The facts recited in finding 13 are relevant also to this claim. The ambiguity which caused plaintiff to drive the sixteen extra piles dealt with in finding 13 also created the necessity for the use of the extra concrete comprised in this item.

16. *Item 4. Jetting cylinders in place, $315.43.*—Plaintiff installed certain cylinders in the parkway underpass, which

when checked by Government engineers were found to be out of line and the defendant ordered plaintiff to reset them. The cost of this work, plus the 15% allowance provided in the contract for overhead and profit on extra work, was $315.43. September 4, 1930, plaintiff made a written claim to the contracting officer for this amount, which is of record as Defendant's Exhibit 1, C-50, and is made a part hereof by reference.

The displacement of the piles referred to in the next finding caused the displacement of the cylinders. Plaintiff encountered no conditions at the site materially different from what should have been expected. This additional work was made necessary on account of a mistake of judgment and incorrect methods employed by plaintiff in performing its work.

17. *Item. 5. Straightening concrete piles, $2,070.49.*—Plaintiff withdrew timbers from the cofferdams of the piers located in the trench just riverward from the piles before backfilling the cofferdams, causing the surrounding earth to cave in, crowding against the piles and carrying them with it. Plaintiff was ordered by defendant to straighten and place them back in position, the cost of which work, plus the 15% allowance mentioned in finding 16 was $2,070.49. Plaintiff made a written claim to the contracting officer for this item on September 4, 1930, after the contract had been completed, which claim is of record as Defendant's Exhibit 1, C-54 to 56, inclusive, and is made a part hereof by reference.

The displacement of the piles in question would not have occurred had plaintiff exercised ordinary skill and judgment in carrying out its work and followed the advice of defendant's representatives as to the method of doing the work and the order in which the work should be done.

18. *Item 6. Hauling and dumping earth from foundation piers, $3,765.88.*—This claim, which was originally stated as $6,125.88, is for hauling away the material excavated from the cofferdams at the piers of the parkway approach. The contract provided that the plaintiff should dig and haul away all additional earth which might be ordered at the rate of 90 cents per cubic yard. The contracting officer found that

40 cents per cubic yard should be allowed for the hauling only, and that the facts warranted payment to plaintiff for hauling 5,900 yards at 40 cents per yard, or a total of $2,360. That amount was paid. This leaves the balance, $3,765.88, the amount of this item of plaintiff's claim.

September 4, 1930, after the completion of the work, plaintiff protested in writing to the contracting officer that it had complied with the provisions of paragraph 20 of the specifications and that the earth was moved with the understanding that the hauling and dumping made necessary by direction of defendant's engineers would be paid for accordingly.

Plaintiff built 48 piers in the parkway approach which were 3 feet wide and 15 feet 9 inches long. According to the specifications the cofferdams were to clear the face of the piers by 1 foot 6 inches on all sides, which would have made the dimensions of each of the cofferdams, 6 feet x 18 feet 9 inches. The average depth to bedrock of the piers was taken at 29½ feet. It was on this basis that the contracting officer found that plaintiff had hauled 5,900 cubic yards of earth, for which he recommended that it be paid at the rate of 40 cents per cubic yard, or $2,360. He further held that plaintiff removed more earth than was required by the specifications; that it was removed either for plaintiff's own convenience or because of plaintiff's faulty methods, and that in either case defendant would not pay for the unnecessary work. The conclusion of the contracting officer as to the amount of earth which plaintiff necessarily moved in fulfilling the requirements of the specifications was substantially correct, and the rate of payment set by the contracting officer was fair.

19. *Item 7. Additional length required to cast on piles above the lengths given in the specifications, $5,643.*—Section 34 of the specifications reads in part as follows:

> The length of piles shall be considered as the net length in place after the cut-off, with no allowance made for extra length to expose dowel steel.
>
> * * * * *
>
> If, due to unexpected depths to bedrock encountered during the work, the aggregate footage of piling driven

> or yardage of concrete placed shall amount to more than the quantities which would have resulted from the assumed average depths just stated, the Contractor will be paid for all excess over and above those quantities as follows:
>
> For wood piles________________________________ $0.75 per lin. ft.
> For 15-inch concrete piles____________________ $1.50 per lin. ft.
> For 18-inch concrete piles____________________ $2.00 per lin. ft.
> For 20-inch concrete piles____________________ $2.75 per lin. ft.
> For concrete in place_________________________ $12.50 per cu. yd.
>
> but no deductions will be made in the case that the aggregate of the quantities actually placed shall be less than the amount that would have resulted from the assumed average depths.
>
> The Contractor shall, however, be solely and entirely responsible for the sufficient length of each individual pile; and he shall pull out and replace, or splice (if splicing be permitted for that case), any pile which after being driven is found to be too short to permit cut-off at the proper level and, in the case of concrete piles, the exposure of the required length of reinforcing steel for dowels.

The unit prices above quoted were amended in part as follows:

> 15-inch concrete piles, at $3.00 per lineal foot.
> 18-inch concrete piles, at $4.00 per lineal foot.

Paragraph 48 of the specifications reads in part as follows:

> The surface of the bedrock as exposed in the piers and abutments of the Arlington Memorial Bridge is in certain areas smooth and gently undulating, but becomes quite irregular at other places—abrupt variations in depth of five feet or more having been found within small horizontal distances. Sometimes the deeper pockets between the high places of the rock are filled with dense sand or pebbles. The surface has been found in general to be a good one for bonding with the concrete, and but little dressing has been found necessary in foundations already placed.

Plaintiff prepared and submitted to the contracting officer a schedule of concrete pile lengths based on the instructions shown on the plans and specifications. It was practically impossible to cast each concrete pile to an exactly correct length since the cut-off level of the tops of the piles was definitely prescribed for each pile on the drawings and the

surface of the bedrock varied in depth. Many of the piles had to have exposed certain lengths of their reinforcing steel, in order to form a necessary bond with the structure to be imposed on the pile. This was done by cutting away the surrounding concrete from the steel after the pile was driven. It was necessary in such cases to cast the piles long enough to provide for these additional lengths of steel. Mr. Sadler, plaintiff's superintendent, solicited advice from the office of the contracting officer in regard to casting these piles and his attention was directed to the provisions of section 34 of the specifications. The contracting officer told Sadler that any advice given him by that office in regard thereto would not act as a release from the responsibility imposed on plaintiff by the specifications, to which statement Sadler assented. The conference resulted in reaching an agreement on certain lengths of piles which the contracting officer considered prudent and economical for plaintiff. The contracting officer advised Sadler that the surest way to ascertain the correct length of the pile for the parkway approach would be to excavate for the piers first. However, plaintiff elected to drive the piles first. The piles were made to the lengths agreed upon, and after they were driven to bedrock their tops extended above the elvations called for in the contract drawings by the aggregate footage shown below. The defendant required plaintiff to cut off enough footage to bring the tops of the piles down to the elevation called for in the contract drawings.

Plaintiff's claim is that this agreement between Sadler and the contracting officer necessitated additional length for the piles in excess of what would have resulted from the assumed average depths stated in section 34 of the specifications, as follows:

893 lineal feet at the unit contract price of $3.00 per lineal foot for the 15-inch piles	$2,679.00
741 lineal feet of the 18-inch piles at the contract unit price per lineal foot of $4.00	2,964.00
Total	5,643.00

The evidence does not show whether these aggregate "excess" lengths were in addition to the lengths necessary to expose the reinforcing steel, as required by the contract.

Accompanying plaintiff's letter of March 4, 1931, to the contracting officer is its memorandum regarding this claim, which is of record as Defendant's Exhibit 1, C–66, 68. Plaintiff made no claim or protest about this matter until after the contract had been completed.

20. *Items 8 to 12*, resulting in increased costs to plaintiff in the sum of $91,840.85, cover the following:

(a) 38 days' delay from May 25, 1929, to July 2, 1929, due to site not being cleared	$3, 079. 30
(b) 17 days' delay from July 2, 1929, to July 19, 1929, due to Government's delay in approving plaintiff's time schedule	1, 402. 76
(c) Damages due to unforeseen conditions, and the foregoing delays (a) and (b) causing operations of contract to extend through winter months and also causing night work and general inefficiency, resulted in additional damages in the sum of	87, 358. 79
	91, 840. 85

The claim for $87,358.79 is made up of the following nine items:

Fixed field labor	$12, 989. 35
Liability insurance	2, 854. 14
Fuel cost	2, 899. 40
Form lumber	1, 265. 49
Depreciation on equipment owned by company	7, 302. 65
Rental on equipment not owned by company	2, 564. 50
Inefficiency of labor, winter months	7, 114. 30
Inefficiency of labor, night work	7, 936. 36
Inefficiency of labor, unforeseen conditions	42, 432. 60
	87, 358.79

Plaintiff's Exhibit 15 and Defendant's Exhibit 1, C–71 to 94, containing an itemized statement of these extra costs, are by reference made a part hereof.

As stated in finding 4, plaintiff's equipment was on the site of the work May 21, 1929, though it did not receive notice to proceed until May 25. Between May 21 and June 9 plaintiff erected its field office and tool sheds, set up its derrick and other equipment, and did other preparatory work. It then proceeded to do whatever it had the equipment and material and staff of workmen to do. It was not

materially interfered with or delayed by any tardiness of the defendant in clearing the site.

Plaintiff at the beginning of the work asked for and received permission to proceed with the work without first submitting its progress schedule, as required by the contract, because it wished to subcontract the pile work and needed time to negotiate. Plaintiff was reminded on June 13 that it had not yet submitted its progress schedule, and still did not submit it until June 29. The contracting officer could have considered and approved it by July 2, but did not do so until July 19, seventeen days later. The work went on during these seventeen days, and it is not proved that any work was not done that would have been done if the progress schedule had been promptly approved. After the contract had been completed and plaintiff had made its claims for additional compensation, the contracting officer, desiring to be generous with plaintiff because plaintiff had lost money on the contract, recommended and the Comptroller General approved the extension of plaintiff's time for completion by these seventeen days, thus excusing plaintiff from $1,700 in liquidated damages.

Paragraphs 46, 48 and 49 of the specifications were in all essential respects accurate. They put plaintiff on notice, before it submitted its bid, that pits and other excavations would have to be dug to considerable depths in or close to the adjacent river, and experienced engineers and contractors would have expected considerable seepage of water into the trenches and pits, which would naturally produce a certain amount of muck and mud in which workmen on the job would be required to stand while digging the pier and cylinder pits and pouring concrete therein. The soil at or near the bottom of the pits, while wet, stood up sufficiently to make unnecessary the installation of sheet piling, cribbing, and bracing for several feet above the bottom of the pits. Slumping of the soil occurred along the margins of some of the trench cuts which had stood open for some time and where the ground slope had been left standing at a steep angle. Earth also slipped in the vicinity of some of the pier and cylinder pits where the contractor had pulled the bulkhead sheeting without taking the precaution to first

backfill the ground area which the sheeting was supporting.

There was no "mud wave" or subsurface movement of the earth such as plaintiff claims. If there had been, it would have been impossible to make these excavations for piers and cylinders down to bed rock, and have the sides of the excavations stand as they did without being cribbed or braced.

Plaintiff on September 20, 1929, after having worked on the contract for some months and having made many excavations for piers and cylinders, in response to an inquiry from the defendant as to why the work was not progressing satisfactorily, made the response which is quoted in finding 8. This response was made after two weeks of investigation and analysis as to why plaintiff was behind schedule. If the alleged delinquencies of the defendant, or excess water, or unforeseen subsurface conditions had been even a substantial contributing factor to the lack of progress, plaintiff would have said so.

21. *Item 13. Repairs to concrete piles charged to plaintiff by Comptroller General, $2,842.50.*—This item refers to the piles that were driven along the parkway approach. Before plaintiff's contract was completed the Government entered into a contract with the National Construction Company for the building of a superstructure on the foundations which plaintiff built, after plaintiff completed its work. For this superstructure, it was necessary to place concrete caps on piles which had already been driven. Due, as the defendant says, to some of the piles being out of line laterally it was necessary to make the caps wider, requiring the use of more concrete and steel. The defendant also says that plaintiff, in cutting off the piles to the proper elevation, was careless and sometimes spoiled the concrete below the lower edge of the cap, thus exposing the reinforcing steel, making it necessary to build an additional amount of concrete around the steel to keep it from rusting. Defendant paid the National Construction Company as an extra for making the pile caps wider and for covering the steel, the sum of $2,842.50, which sum was charged to plaintiff by the contracting officer. Upon appeal it was held by the Comptroller General that this was a proper charge against plaintiff.

The defendant has not proved that these alleged defects, if they existed, were due to plaintiff's fault. The alleged defects were not called to plaintiff's attention when the defendant accepted plaintiff's work as complete. If they did exist then, most of them would have been apparent.

22. *Item 14. Liquidated damages, 13,300.*—Article 9 of the contract is in part as follows:

> *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. * * * If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof.

Paragraph 42 of the specifications provides in part:

> The time for completion, as proposed by each bidder, will be given weight in canvassing the bids at the rate of one hundred dollars ($100) per calendar day; and the time for completion as named by the successful bidder will be made a part of the contract which will also provide for liquidated damages in the amount of one hundred dollars ($100) per calendar day for delay in completing the work beyond the time thus fixed and agreed upon for its completion.

Paragraph 31 and 22 of the specifications provide for extensions of time for extra work, and paragraph 42 states the amount of liquidated damages to be assessed for each calendar day's delay. It is not proved that any general or informal assurance was given the contractor modifying the effect of the specifications as to the extension of time or the remission of liquidated damages. In certain instances when additional work was required by the contracting offi-

cer, the pro rata basis provided in paragraph 31 of the specifications for extension of time was waived by him as being unfair to the contractor; and additional amounts of time were allowed in each of the several instances in order to compensate plaintiff for time lost in moving plant, rental of crane to defendant, and for other causes not reflected in the actual cost of the work.

No liquidated damages were assessed against plaintiff except as provided in the contract.

23. *Item 15. Administration and office overhead for 150 days, $8,159.10.*—This item represents the proportional part of all of plaintiff's general main office overhead applicable to the contract in suit for the alleged delay of 150 days for which plaintiff claims damages.

24. Plaintiff appealed to the Comptroller General from the findings and conclusions of the contracting officer, which appeal was denied, except that, as recommended by the contracting officer, the Comptroller General allowed the plaintiff 17 days additional time on account of delay by the defendant in approving the progress schedule. He also allowed, as the contracting officer had done, 62 days' additional time on account of extra work, leaving a balance of 133 days' delay out of the gross period of late completion for which he charged plaintiff liquidated damages at the rate of $100 a day, or $13,300.

September 25, 1931, the Comptroller General issued a certificate of settlement reading in part as follows:

> I CERTIFY there is due from the United States to the above-named claimant, payable from the appropriations indicated, the sum of Five Thousand Two Hundred Nine and 30/100 Dollars ($5,209.30) on account of final settlement under contract A. M. B.–28 dated May 18, 1929, providing for the construction of the foundations for the several structures comprising the Bridge Plaza and the Water Gate of the Arlington Memorial Bridge Project, Washington, D. C.

0X716	Arlington Memorial Bridge:	
	Claimed	$79,933.27
	Disallowed	74,723.97
	Payable to claimant	5,209.30

Claim for $74,723.97 which represents the difference between $79,933.27, the total amount claimed, and

$5,209.30, the amount allowed in this settlement, is disallowed for reasons as follows:

The contractor's claim consists of $15,000.00 charged as liquidated damages; $1,000.00 retained until completion of the work; $2,742.50 which should have been $2,842.50, deducted on account of defective work, and $61,190.77 on account of alleged extra work and additional cost.

November 23, 1931, plaintiff requested a reopening and review of the settlement, which was denied by the Comptroller General, who stated in part as follows:

> * * * The duty of making findings of facts, is, under the provisions of the contract, clearly that of the contracting officer, his findings when made being subject only to appeal to his superiors, and that duty may not be delegated to any officer or instrumentality of the Government other than to those mentioned.
>
> The settlement previously made in your behalf having given full effect to the findings of the contracting officer as submitted to this office, which findings have recently been adhered to by that officer, and no appeal having been taken from those findings—either as to alleged delays occurring during performance of the contract work or as to disputed questions arising under the contract—there is no further action this office legally may take in the matter, and the request for the reopening and further consideration of the claim, as well as the request for the privilege of presenting witnesses to this office for the purpose of substantiating the different items of the claim, must be and is denied.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

On May 18, 1929, plaintiff, a North Carolina corporation, entered into a contract with the defendant to furnish all labor and materials and perform all work required for the construction of the foundations of the several structures comprising the Bridge Plaza and the Watergate of the Arlington Memorial Bridge project, Washington, D. C., together with any additional work directed by the contracting officer, such additional work to be paid for at the unit prices specified in the contract.

The work under the contract included furnishing all labor and materials for clearing the site of the work of trees, buildings, underground water pipes, conduits and other obstructions; digging trenches along the parkway and at the site of the Watergate; digging and cribbing 82 pits or wells, into which reinforced concrete for cylinders and foundation piers was to be placed; constructing cofferdams around areas where work was to be carried on within or near the limits of the river bed, where seepage of water might be expected; building wooden forms for and casting and driving 576 reinforced concrete piles; driving several thousand feet of sheet piling, both wood and steel; and tearing out and reconstructing a large sewer which intersected the site of the work.

The contract price was $328,700, and the work was to be completed within 180 days after receipt of notice to proceed, which made the original completion date November 21, 1929. The contract provided that liquidated damages in the amount of $100 per day might be assessed against plaintiff for lateness in completing the contract work. It also provided that the time for completion would be equitably extended on account, *inter alia*, of changes or additions directed by the contracting officer which delayed completion. On account of changes directed by the contracting officer during the course of the contract plaintiff received $70,192.28 additional compensation and 62 days' additional time for performance. The work was completed June 21, 1930, 212 days after the original completion date and 150 days after the completion date as extended.

Plaintiff sues for $133,000 under a special act of Congress approved May 6, 1937 (50 Stat. 955). That act reads as follows:

> That the claim of Grier-Lowrance Construction Company, Incorporated, for losses and damages under contract numbered AMB 28, dated May 18, 1929, for the construction of the foundation for the several structures of the Arlington Memorial Bridge project be, and the same is hereby, referred to the United States Court of Claims with jurisdiction to hear the same to judgment, said claim to be adjudicated upon the basis of all losses or damages suffered by the said company duly found to

be due to acts of the Government or delays caused by the Government or subsurface conditions unknown to the contractor and not disclosed by the Government before contract was entered into, notwithstanding any lapse of time or any provisions of the statute of limitations: *Provided*, That suit hereunder is instituted within four months from the approval of this Act.

Plaintiff contends that the court's function under this act is limited to the ascertainment of the amount of losses suffered by plaintiff due to "acts of the Government or delays caused by the Government or sub-surface conditions unknown to the contractor and not disclosed by the Government before contract was entered into", and that, this amount having been found, judgment for plaintiff should follow as a matter of course. This contention would seem to mean that Congress intended that it should be immaterial whether the "acts of the Government" or "delays caused by the Government" were rightful or wrongful, and that the absence of disclosure by the Government of "sub-surface conditions unknown to the contractor" should be a ground of recovery even though the Government did not know and had no duty to know the conditions, and even though plaintiff could, by the exercise of prudence, have known them itself, or had, by the terms of the contract, assumed the risk of such variations in the conditions of the work as actually were encountered. We think that Congress had no intention to imposed upon us the duty to discard all legal and equitable bases of liability and merely trace the relation of cause and effect between rightful and proper conduct on the part of the Government, or risks contracted for by plaintiff and paid for by the Government and "losses" suffered by plaintiff as a consequence thereof. We think that Congress would hardly have described as "losses or damages suffered by the said company duly found to be due" to acts of the Government, the mere financial consequences to plaintiff of the Government doing what it had a right to do, or its insisting on plaintiff's doing what it had contracted to do. In our consideration of the case, therefore, we shall examine into the consequences only of wrongful acts or nondisclosures of the Government, or breaches of contract on its part, or refusals to compensate plaintiff as provided in the contract.

A question arises as to whether plaintiff's failure to make timely written protests concerning the subjects of its claims, and its failure to appeal from adverse decisions of administrative officials, prevents our consideration of those claims on their merits, or whether the special jurisdictional act relieves plaintiff of these impediments. A consideration of the legislative history of the special act persuades us that Congress did not intend to give plaintiff any special relief in that direction. In view however, of what we say hereinafter about the contracting officer's waiver of the lateness of plaintiff's claims, and of the impracticability of any appeal in the peculiar circumstances of the case, the question becomes immaterial, and we do not discuss the legislative history.

Plaintiff claims that a considerable number of items of work which it did, and which, it alleges, it was required to do, were made necessary by some fault of the defendant, or by some unforeseen condition which developed on the job, or were, under the terms of the contract, such items as entitled plaintiff to greater compensation than plaintiff has been paid, or were wholly outside the requirements of the contract.

Paragraph 20 of the specifications was as follows:

> *Protests.*—If the Contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the Contracting Officer or of the inspectors to be unfair, he shall immediately ask for written instructions or decision, and, within ten days after receipt of the same, he shall file a written protest with the Contracting Officer, stating clearly the basis of his objections. Unless the Contractor files protest as thus provided, he will be considered to have accepted the record or ruling.

In no instance did plaintiff ask for a written instruction or decision, or file a written protest with the contracting officer within the specified ten days. However, the contracting officer disregarded this provision of the specifications just as completely as plaintiff did, by accepting plaintiff's claims after the work was completed, and considering them on their merits. To be sure, in his communications to the Comptroller General, the contracting

officer mentioned that the plaintiff had not protested the various matters at the time they arose. He was, apparently, only citing this fact as evidence of lack of merit in the claim, and not as a bar to consideration of the claim. Besides, these communications to the Comptroller General were not made known to plaintiff, and so would not avoid the waiver which resulted from the contracting officer's consideration of the claims on their merits.

When the contracting officer did decide the belated claims against plaintiff on their merits, plaintiff, according to the provisions of Article 15 of the contract, was to have had the right to appeal to the head of the department. But the contracting officer was the chief executive officer of the Memorial Bridge Commission which made the contract, so he was also, in effect, the head of the department. In the circumstances, no appeal was practicable. Besides, the contracting officer, to some extent not clear from the record, abdicated his function of decision in favor of the Comptroller General, who was not, under the contract, given any power of decision.

In this state of confusion in the contract itself, and in the conduct of both parties, we shall consider and decide the several items of plaintiff's claim on their merits.

Items 1 and 3.—Making and driving 16 extra concrete piles, main steps, and placing extra concrete in connection therewith.

Plaintiff claims $2,438.00 for making and driving 16 extra concrete piles, in addition to the number called for by the contract, and $465.50 for placing extra concrete to enlarge the area of footings to include these piles. The piles called for by the contract were to be driven in groups of five, four of them making the corners of a square and the fifth in the center. A concrete footing was then to be poured which would rest on these five piles, and a column, not included in plaintiff's contract, was intended to be rested on each footing. Plaintiff drove some of the piles in each group, in the instances in question, so that they were not in the position intended by the defendant. When this fact was discovered, plaintiff was permitted to drive an extra pile in each such

group so that the group of six piles could be covered by a concrete footing larger in area than that originally intended, on which larger footing the column could be properly centered. It was less expensive to plaintiff to use the 16 extra piles and the extra concrete required by the enlarged footings than it would have been to pull the piles that were out of place and put them or others where they were intended to be.

Our question is whether the plaintiff or the defendant was responsible for the misplacing of the piles: We have found that the contract drawing was ambiguous, and that plaintiff's interpretation of it was not unreasonable. The drawing had a legend, "C L (meaning center line) of Footing", with an arrow leading to a line running through the center of a square. It had another legend, "C L Column", with two arrows leading to two lines near to and equidistant from the former line. What the legend and arrows were supposed to mean is not made clear in the evidence, but on the face of the drawing they are confusing. Plaintiff made a lay-out of where it proposed to drive the piles and presented it to the defendant's representatives. They, to use the langauge of the contracting officer, "did not discover the mistake and did not disapprove the contractor's lay-out as originally placed." When, after the piles were driven, it was discovered that there was something wrong it took a long conference to figure out how the mistake had been made. That fact is evidence of confusion in the drawings.

The defendant urges, and we have found, that plaintiff's superintendent admitted that it was plaintiff's mistake and asked to be allowed to correct it in the most inexpensive way. That is strong evidence pointing to plaintiff's responsibility, yet it does not persuade us. Since nothing occurred thereafter which would give rise to any estoppel against plaintiff because of ths admission of its superintendent, we conclude that plaintiff is entitled to be compensated for correcting a condition caused by the defendant's mistake. We therefore give plaintiff a judgment for the cost of making and driving the extra piles, covered by Item 1 of its claim, and for placing the extra concrete, covered by Item 3.

Item 2.—Extra concrete used in increasing depth of footings as a substitute for lengthening piles by splicing.

Plaintiff claims $2,257.20 for 118.8 cubic yards of concrete used in adding extra depth to footings under the main steps of the project, because the piles which it drove there were too short to bring their tops up to the intended level of the bottoms of the footings. The level of the bedrock, some 50 feet below the surface of the site, was irregular. In casting concrete piles and selecting piles for estimated correct length for driving to bedrock in particular locations on the project, it was inevitable that some of them would not be the right length. If they were too long they would have to be cut off, which would involve work and waste. If they were too short they would have to be pulled out and replaced with longer ones, or spliced, which considering the splicing of the reinforcing steel in the piles, was difficult. Plaintiff proposed and the defendant assented to the proposal, that instead of pulling or splicing the short piles, deeper footings should be used. This took more concrete than the corresponding length of piles would have taken, but still was less expensive.

We think there was no duty on the defendant to pay for this extra concrete. The last paragraph of specification 34, set out in finding 14, is as follows:

> The contractor shall, however, be solely and entirely responsible for the sufficient length of each individual pile; and he shall pull out and replace, or splice (if splicing be permitted for that case), any pile which after being driven is found to be too short to permit cutoff at the proper level and, in the case of concrete piles, the exposure of the required length of reinforcing steel for dowels.

The third paragraph of specification 48, which is set out in finding 3, warned the contractor of abrupt variations of the level of bedrock under the area. In the face of these warnings, plaintiff, if it made a prudent bid, must have estimated for the additional expense whch would or might result from these variations, and that estimate must have been reflected in its bid. The Government has already paid plaintiff for this risk and should not have to pay again.

Item 4.—Jetting concrete cylinders in place.

Item 5.—Straightening concrete piles.

Plaintiff poured certain concrete cylinders in the parkway underpass and drove certain concrete piles in the same area, which cylinders and piles became warped out of vertical position, and plaintiff was required to straighten them up. Plaintiff contends that the cause of the trouble was an unforeseen tendency of the subsurface earth to move, and faulty design of the project. We have found that plaintiff has not proved these contentions, and that the reason for the cylinders and piles having moved out of alinement was plaintiff's order of carrying on the work, in disregard of the advice of the defendant's representatives, and plaintiff's failure to back fill the caissons in which the piers were poured, which resulted in cave-ins and disturbances of the earth.

Item 6.—Hauling and dumping earth from foundation piers.

Plaintiff claims $3,765.88 for hauling away the material excavated from the cofferdams at the piers of the parkway approach. The contract set a price of 90 cents per cubic yard for digging and hauling away extra earth which might be ordered.

There was extra earth, for the digging of which plaintiff had been otherwise paid. The contracting officer determined that the price for hauling alone should be 40 cents, and we have found that that was a fair price. He also found by computations based on the dimensions of the cofferdams how much additional earth there should have been to be hauled away, if the proper and necessary amount of excavation had been done. These computations were reasonable, and plaintiff did not satisfactorily prove either the existence of or the necessity for the larger amount of yardage on which it bases its claim. Plaintiff may not recover on this item.

Item 7.—Additional length required to cast on piles above the lengths given in the specifications.

Because of the variation in the depth of bedrock over the area of the project, it was, as we have seen, impossible to fix in advance the exact length of each of the 576 concrete

piles which were to be driven. Section 33 of the specifications gave an assumed average depth of bedrock for each of the several locations where groups of piles were to be driven, and provided that if the assumptions proved to be incorrect, and the aggregate footage of piles required should turn out to be more than the estimate, the contractor would be paid for the excess at the unit rate per foot, but if the aggregate should turn out to be less than the estimate, no deduction from the estimated amount would be made.

Plaintiff, before casting its piles, presented to the defendant a statement showing the lengths in which it proposed to cast the several groups of piles, and asked for suggestions. The defendant's representatives advised plaintiff that the responsibility for estimating the correct length of the piles was on plaintiff; that the way to be sure of the length of the piles would be to first excavate for the piers in the areas where the piles were to be driven, and in that way discover the actual depth of the bedrock; but that if this was not done it would be prudent, in view of the difficulties of splicing piles if they proved to be too short, to cast the piles longer than the assumed depth of bedrock and cut off the excess, if any. Plaintiff followed the advice to cast extra length on the piles and now claims that, under the contract, it is entitled to be paid for the excess cutoff at the footage rate provided in the contract, the amount of plaintiff's claim in that regard being $5,643.

Section 34 of the specifications, which section related to "extra work", provided, *inter alia*—

> As stated on the drawings, the elevations shown for bedrock are average only, and departures of five feet or more either way from the depths shown may be expected due to local variations.
>
> If, due to unexpected depths to bedrock encountered during the work, the aggregate footage of piling driven * * * shall amount to more than the quantities which would have resulted from the assumed average depths just stated, the Contractor will be paid for all excess over and above these quantities as follows: (Here amounts per foot for the several types and sizes of piles were given.)

The same section of the specifications also provided:

> The length of piles shall be considered as the net length in place after the cut-off, with no allowance made for extra length to expose dowel steel.

We think that the contracting officer's consultation with and advice to plaintiff as to what would be economical practice in the casting of the piles did not affect the rights of the parties under the contract. We think that the last quoted paragraph of the specifications is plain to the effect that the footage to be measured in computing extra pay was the footage in the ground. We suppose that plaintiff, if it made a prudent estimate before it bid on the contract, must have included in that estimate the wastage which would necessarily result from the fact, made clear by the specifications, that the depth of bedrock varied. The fact that in another instance under the contract, in the case of an extreme variation from the estimated depth, the defendant, as plaintiff says, "after a long contest * * * finally paid plaintiff for the additional length of the 65 foot piles" does not show a contemporaneous construction of the contract such as to vary what it seems on its face to say.

Items 8 to 12.—These items, for which plaintiff claims $91,840.85, are, according to plaintiff's allegations, based on increased expenses due to defaults of the defendant, causing delays in performance, and to difficulties and delays arising from excessive water encroaching upon the work and unstable subsurface soil conditions.

The first item in this group of claims is for 38 days' delay from May 25 to July 2, 1929. Plaintiff claims that it lost this time because the site had not been cleared. But the evidence shows that the alleged obstructions on the site, other than those which plaintiff had contracted to remove, did not materially interfere with plaintiff's progress, and that, in fact, plaintiff did not lose the time, but made substantial progress during this period.

The next item is 17 days' delay from July 2, 1929 to July 19, due to the Government's delay in approving plaintiff's time schedule. The defendant's officials frankly conceded

that the schedule could have been approved by July 2, and, in the settlement of liquidated damages because of late completion, plaintiff was excused for these 17 days. Our question, however, is whether plaintiff was actually delayed for the whole or any ascertainable part of the 17 days, so that consequential damages should be awarded it. According to the contract, plaintiff was not to begin work at all until its schedule had been presented and approved. It did begin work, however, on May 25, and after obtaining a postponement of its presentation of its schedule on account of its intended subcontracting of pile driving, it had to be reminded on June 13 that it had not presented the schedule. It still did not do so until June 29. We are not convinced that either plaintiff's delay in presenting its schedule, or the defendant's delay in approving it, actually prevented work from being done that would otherwise have been done. Plaintiff's letter of September 20, 1929, hereinafter quoted, represents plaintiff's own opinion of the cause of the lack of satisfactory progress up to and long beyond that time.

The next item in this group of claims is for $87,358.79, based on damages due to unforeseen conditions and to the 55 days' delay covered by the two preceding items, causing the operations of the contract to extend through winter months and also causing night work and general inefficiency, resulting in additional damages in the named sum.

We have already dealt with the question of whether the defendant caused plaintiff the 55 days' delay which is asserted as a part of the cause of this item of damage. As to the alleged unforeseen conditions, we have found that their existence has not been proved. Section 48 of the specifications, quoted in finding 3, sets forth in detail and, as we have found, accurately, except in unimportant particulars of which the defendant was not aware, the conditions on the site with reference to the subsoil, and the surface of the bedrock. Sections 10, 46, and 49 of the specifications, quoted in findings 2 and 3, impose on plaintiff the duty of inspecting the site, of planning its own methods of doing the work, and of accomplishing the work for the contract price.

As to the alleged excess of water in the excavations, the

proof does not convince us that more water was encountered than was to be expected in work, much of which was to be carried down some forty feet to bedrock, along the bank of a tidal stream and in all kinds of weather. We have found that the old loose rock sea wall, which, plaintiff claims, acted as a duct to permit water to come into the project, did not have any substantial effect in that direction. The old cinder ballast of a temporary railroad track which had been abandoned many years before may have caused some difficulty in the driving of the few piles which passed through it, but it was, on the other hand, easier to excavate than the materials described in the specifications. It did not constitute an unforeseen subsurface condition unless that expression is to be made to apply to even slight and unimportant variations from just what is expected.

Plaintiff claims that there was, beginning some 12 feet below the surface of the ground, a "mud wave" or underground movement, which was entirely unlike anything plaintiff had ever encountered in similar work, the force of which was such that it swayed piles and concrete cylinders which extended some forty feet into the ground to bedrock. We have found that there was no such movement.

When plaintiff began its work, the Memorial Bridge, the east end of which adjoined plaintiff's work, was being completed. There is no evidence that the contractors who built that bridge, and who excavated extensively in that adjacent ground, encountered any such movement. Plaintiff excavated numerous pits for cylinders and piers, and the sides of these pits stood up with no more cribbing than would have been expected in soil near to a tidal river. This would have been impossible if there had been any such underground movement as plaintiff claims.

On September 20, 1929, after plaintiff had been working on the project for four months of the six months within which the whole project was originally intended to be completed, plaintiff, in reply to a letter from the defendant complaining about the slowness of plaintiff's progress, answered, in part as follows:

> We did not answer your letter of September 7th pending a more thorough investigation into our in-

> ability to comply with the amended schedule as agreed in your office some weeks ago. Mr. Sadler is quite conversant with the circumstances, and we have asked him to rearrange the schedule to your satisfaction, which we take it has been or is being done. The reinforcing steel has been no end of trouble to us and we think has caused, in so far as we are able to determine, all of our delays.
>
> * * * * *
>
> We feel that we now have enough materials on the job to really prosecute the several undertakings with diligence and with profitable results, and believe that from now on we can in a measure reclaim the time lost.

By the time this letter was written, excavation for piers and cylinders had been going on for some three months, and the concrete had been poured in many of them. If the underground movement existed, it would have been causing daily trouble. Yet plaintiff, after taking two weeks to investigate the cause of its lack of progress, wrote "The reinforcing steel has been no end of trouble to us, and we think has caused, in so far as we are able to determine, all our troubles." Our conclusion is that plaintiff was not delayed by the Government in the performance of its contract and did not encounter, to any appreciable degree, subsurface conditions unknown to plaintiff and not disclosed by the Government. Plaintiff is not therefore, entitled to damages under these items of its claim.

Item 13.—Repairs to concrete piles charged to plaintiff by Comptroller General.

The facts relating to this item are recited in finding 21. The defendant deducted $2,842.50 from plaintiff's contract price to reimburse itself for work done by another contractor to repair a defective condition for which, the defendant claims, plaintiff was responsible. To justify the defendant in making such a deduction, after it had accepted plaintiff's work, we think the defendant had the burden of proving plaintiff's responsibility for the defect, and explaining why, when at least a part of the conditions later repaired by the other contractor must have been obvious, the defendant accepted plaintiff's work as complete. As to the lack of alinement of the piles, we are left in doubt as to whether

they are supposed to have been driven in the wrong place, or to have leaned out of place after the work was accepted. As to the exposed reinforcing steel, that must have been apparent when plaintiff's work was accepted. In this state of the record, we conclude that the deduction was not justified, and that plaintiff should recover the amount deducted, which was $2,842.50.

Item 14.—Liquidated Damages.

Item 15.—Administrative and office overhead for 150 days.

These items are determined adversely to plaintiff by our determinations concerning prior items. We have concluded that plaintiff was not, beyond the time allowed it, delayed in completing the work by any cause for which the defendant was responsible, or which was, under the contract, an excuse for late completion. The assessment of liquidated damages for late completion was, therefore, what plaintiff had agreed to, and the additional overhead for the period of delay was not the responsibility of the Government.

Plaintiff may recover $5,746.00. It is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

THE STEPHENS-ADAMSON MANUFACTURING COMPANY, INC. v. THE UNITED STATES

[No. 44068. Decided March 1, 1943]

On the Proofs

National Industrial Recovery Administration Act; suit to recover increased costs; evidence held insufficient to show overhead costs increased.—In a suit, brought under the Act of June 25, 1938 (52 Stat. 1197), to recover increased overhead costs alleged to have been incurred as the result of the enactment of the National Industrial Recovery Administration Act (48 Stat. 195); it is *held* the allegations of plaintiff's petition are unsupported by the evidence and the new ground taken during the taking of testimony is likewise without foundation, and accordingly the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. O. R. McGuire, Jr., for the plaintiff. *Messrs. Hogan & Hartson* were on the briefs.

Mr. J. H. Reddy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Illinois and engaged in the business of manufacturing machinery, with its principal place of business at Aurora, Illinois.

2. On April 23, 1932, the defendant entered into a contract with the B-W Construction Company for the extension, remodeling, and enlargement of the United States Post Office at Washington, D. C. On May 5, 1932, the B-W Construction Company sublet to plaintiff the furnishing and installation of all new mail equipment and the reconditioning of certain of the old equipment for the sum of $140,000.00.

3. On August 10, 1933, the plaintiff signed the President's Reemployment Agreement (hereinafter referred to as P. R. A.). The plaintiff was a party to the Code of Fair Competition for the Machinery and Allied Products Industry (hereinafter referred to as the Code), which became effective March 28, 1934.

4. The plaintiff was a manufacturer of machinery. During the period in controversy and prior thereto the plaintiff did not manufacture any stock material. The materials manufactured were all specific and for particular purposes, and no two jobs were alike. The manufacturing plant was composed of a number of departments.

The following tabulation shows the number of employees for each pay period during the six months prior to the National Industrial Recovery Act, the total wages paid them, the average hourly rate of wages, the total number of hours in each pay period on the basis of a fifty-hour week, and the total hours all of the employees would have worked on this basis, and the actual hours they worked, and the

percentage these actual hours were of the total number of hours on the basis of a fifty-hour week:

Six months' period prior to N. R. A.

Semimonthly pay-roll period	No. of employees working	Total wages paid	Average hourly rate	Possible hours on 50-hour plant schedule		Actual hours worked	% of normal
				Each	Total		
1933							
2-1 to 2-15	139	3, 588. 25	. 547	109	15, 151	6, 560	43. 3
2-16 to 2-28	134	3, 193. 99	. 566	91	12, 194	5, 641	46. 3
3-1 to 3-15	131	3, 620. 79	. 545	109	14, 279	6, 639	46. 5
3-16 to 3-31	139	4, 998. 29	. 537	118	16, 402	9, 314	56. 8
4-1 to 4-15	140	4, 614. 74	. 542	105	14, 700	9, 087	61. 8
4-16 to 4-30	131	4, 368. 90	. 546	100	13, 100	8, 370	63. 9
5-1 to 5-15	134	4, 921. 16	. 547	109	14, 606	9, 478	64. 9
5-16 to 5-31	141	5, 799. 17	. 535	109	15, 369	11, 723	76. 3
6-1 to 6-15	143	5, 903. 41	. 541	109	15, 587	11, 647	74. 7
6-16 to 6-30	150	7, 161. 85	. 53	109	16, 350	14, 743	90. 0
7-1 to 7-15	150	5, 656. 52	. 524	96	14, 400	11, 267	78. 2
7-16 to 7-31	151	5, 933. 93	. 524	109	16, 459	11, 651	70. 8
Averages	140	4, 980. 08	. 515	-------	14, 883	9, 677	65. 0

5. The P. R. A. provided a maximum workweek of 35 hours until December 31, 1933, "but with the right to work a maximum week of 40 hours for any six weeks within this period."

The Code provided that "employees shall not be permitted to work in excess of 40 hours in any one week."

Both P. R. A. and the Code provided that maximum hours shall not apply to employees on emergency maintenance or emergency repair work, and both provided a minimum pay of 40 cents per hour.

6. The average number of employees in plaintiff's plant was about 140. Before P. R. A. 12 employees received less than 40 cents per hour, and their wages were increased to the minimum. The other employees received the minimum wage per hour or more, and their hourly wages were not increased during the performance of the contract.

7. On August 10, 1933, plaintiff commenced the manufacture of the mail handling equipment under its subcontract; the work was completed April 30, 1934.

The following tabulation shows in the first column the number of each pay period during the performance of the contract; the next column the pay period by dates; in the

third column the hours permitted under the P. R. A.; in the next the number of men working 50 hours or less; and in each succeeding column the number working for the number of hours listed at the head of the column:

Schedule showing actual number of men and hours by pay periods as compared with hours agreed upon in President's reemployment agreement signed August 10, 1933

Pay No.	Pay period	Number of men and hours worked—Grouped by pay period											
		Hours as agreed	50 or less	51 to 55	56 to 60	61 to 65	66 to 70	71 to 75	76 to 80	81 to 85	86 to 90	91 to 95	96 or over
	1933												
965	8- 1 to 8-15	77	32	3	6	6	4	4	34	4	41	1	------
966	8-16 to 8-31	84	47	----	9	4	----	5	22	35	4	2	25
967	9- 1 to 9-15	70	75	4	9	3	14	25	3	1	----	----	------
968	9-16 to 9-30	70	72	----	7	4	43	7	1	----	----	----	------
969	10- 1 to 10-15	70	54	5	2	3	34	----	39	1	1	----	------
970	10-16 to 10-31	84	47	3	5	3	5	3	5	28	5	4	39
971	11- 1 to 11-15	77	21	----	8	8	7	10	48	4	40	2	2
972	11-16 to 11-30	70	19	3	9	11	54	13	40	1	----	----	------
973	12- 1 to 12-15	77	8	4	2	5	10	2	60	4	45	5	2
974	12-16 to 12-31	63	57	1	3	21	5	50	4	----	2	----	------
	1934												
975	1- 1 to 1-15	77	96	3	8	7	5	6	8	4	2	3	------
976	1-16 to 1-31	84	30	3	6	7	3	3	3	31	7	3	45
977	2- 1 to 2-15	77	31	2	6	13	6	18	40	2	14	2	7
978	2-16 to 2-28	63	49	3	10	62	6	6	2	3	----	1	1
979	3- 1 to 3-15	77	17	6	3	9	6	5	33	9	48	4	2
980	3-16 to 3-31	77	36	1	2	1	8	1	38	16	39	4	------
981	4- 1 to 4-15	70	39	1	4	4	44	36	19	----	----	----	1
982	4-16 to 4-30	77	59	3	5	3	19	11	39	6	1	----	1
983	5- 1 to 5-15	77	120	----	1	1	1	1	8	----	----	----	------
984	5-16 to 5-31	84	32	6	11	7	5	3	30	32	16	----	------

8. The following table shows the number of men working for each pay period, the number of hours the P. R. A. permitted them to work, the total agreed hours, and the number of hours actually worked:

Schedule showing by pay periods total agreed shop hours as compared with actual hours worked

Pay No.	Pay-roll period	Number of men working	Agreed hrs. per pay period	Total agreed hours	Actual hours worked
	1933				
965	8-1 to 8-15	147	77	11,319	10,031
966	8-16 to 8-31	150	84	12,600	10,283
967	9-1 to 9-15	134	70	9,380	6.488
968	9-16 to 9-30	132	70	9,240	6,683
969	10-1 to 10-15	136	70	9,520	7,838
970	10-16 to 10-31	144	84	12,096	10,032
971	11-1 to 11-15	144	77	11,088	10,757
972	11-16 to 11-30	147	70	10,290	10,011
973	12-1 to 12-15	146	77	11,242	11,233
974	12-16 to 12-31	141	63	8,883	7,814

Schedule showing by pay periods total agreed shop hours as compared with actual hours worked—Continued

Pay No.	Pay-roll period	Number of men working	Agreed hrs. per pay period	Total agreed hours	Actual hours worked
	1934				
975	1-1 to 1-15	140	77	10,780	6,801
976	1-16 to 1-31	140	84	11,760	10,644
977	2-1 to 2-15	140	77	10,780	9,420
978	2-16 to 2-28	141	63	8,883	7,540
979	3-1 to 3-15	140	77	10,780	10,403
980	3-16 to 3-31	144	77	11,088	10,167
981	4-1 to 4-15	145	70	10,150	8,969
982	4-16 to 4-30	143	77	11,011	8,331
				190,890	163,445

9. Plaintiff's fixed overhead expense prior to and during the performance of the contract remained constant. For the period from August 10, 1933, to April 30, 1934, it amounted to $73,812.40, consisting of insurance, taxes, general salaries, foreman salaries, miscellaneous indirect shop and clerical labor, and depreciation of buildings, tools, fixtures, and machinery.

During the period from August 10, 1933, to April 30, 1934, plaintiff produced in its manufacturing plant materials having a total value of $555,554.94. Of this amount $111,000 was the value of the materials produced by plaintiff on its contract with the B–W Construction Company.

10. Plaintiff's claim was presented to the head of the department concerned within the limitation period prescribed by law; and the head of the department, after examining the claim, transmitted the same to the Comptroller General, accompanied with an administrative finding of fact and recommendation with respect to the claim. The Comptroller General disallowed the claim.

11. There is no satisfactory proof in the record that the plaintiff company sustained any increase in its cost of operations as a result of enactment of the National Industrial Recovery Act, the promulgation of the P. R. A., or the adoption of the Code.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit to recover increased costs alleged to have been incurred as the result of the enactment of the National Industrial Recovery Act. It is brought under the Act of June 25, 1938 (52 Stat. 1197), allowing recovery of increased costs resulting from the enactment of the National Industrial Recovery Act.

The B-W Construction Company had a contract for the remodelling of the Post Office Department building in Washington, D. C. It sublet to plaintiff the installation of all new mail handling equipment and the reconditioning of the old. This was done on May 5, 1932, and the plaintiff started work on August 10, 1933, the same day it signed the President's Reemployment Agreement (hereinafter called P. R. A.).

In its petition plaintiff alleged that its plant was operated on a fifty-hour a week basis and that in bidding on jobs, including this one, it included its overhead cost on this basis. As a result of the limitation of the workweek to 35 hours by the P. R. A., and to 40 hours by the subsequent Code under the National Industrial Recovery Act (hereinafter called the N. R. A.), plaintiff says the length of time required to complete the job was increased by thirty percent and consequently its overhead costs were increased by this percentage. For this amount it sues.

Plaintiff's testimony in chief was taken prior to the adoption of our order requiring claimants under the Act of June 25, 1938 to furnish the defendant statements showing in detail their alleged increased costs and to give defendant's accountants access to their books so that the statements might be checked. In that testimony plaintiff's only witness, its assistant treasurer, one Karl A. Krause, swore that prior to August 10, 1933, the date of the P. R. A., plaintiff's plant was working 50 hours a week. If they could have operated 50 hours a week during the contract period, plaintiff says, they would have worked a total of 271,795 hours, which is based on all their employees working exactly 50 hours a week, whereas they in fact worked but 163,445 hours. All of Krause's testimony and calculations are on the basis of a

50-hour week prior to the P. R. A., and this is the basis of the petition.

Afterwards plaintiff furnished the statements required by our order, and the defendant's accountant checked its books. Krause's statement that they had been working 50 hours a week prior to the P. R. A. proved to be untrue. Instead of having worked 50 hours a week the plant for the six-month period prior to N. R. A. had worked on the average but 32½ hours a week, with a maximum of 45 hours and a minimum of 21.7 hours. The foundation for all of plaintiff's calculations was therefore swept away.

Then plaintiff shifted its ground. Krause was recalled and testified plaintiff's bid for the Post Office Department's work was based on running 50 hours a week. He did not support this statement with his work sheets or otherwise. A reading of his entire testimony and the exhibits convinces us that plaintiff would not have operated its plant on a 50-hour week, N. R. A. or not, unless they could have gotten sufficient work to justify it, and that it knew this when it put in its bid. Prior to the N. R. A. they worked but 32½ hours a week, and Krause says this was on account of lack of work. About the same time plaintiff bid on this job it also bid on a job in Chicago amounting to over $3,000,000, but it did not get it. In consequence plaintiff did not have enough work to run fifty hours a week and did not do so.

The evidence shows plaintiff paid but little attention to the 35-hour limitation when the work at hand demanded longer hours. Defendant's exhibit BB, quoted in finding 7, shows that in the first pay period after the job began there were 46 men out of a total of 135 who worked from 80 to 95 hours a week, whereas, the P. R. A. limit for the period was 77 hours. In the next period there were 31 men working longer hours than the limit of 84 hours, 25 of whom worked 96 hours and more. This was out of a total number of employees averaging 139. In the next period there were only four who worked overtime, and in the next only one, but in the following six periods there were 41, 48, 48, 41, 56 and 61, respectively. In the next period there were only 9,

but in the following six there were 55, 35, 19, 63, 59, and 20, respectively. In the last three periods there were 8, 0, and 16, respectively. Had plaintiff's work on hand justified it, apparently it would have worked the 50 hours a week, notwithstanding the agreement and the Code.

On the other hand, many of plaintiff's men did not work as long as the P. R. A. permitted. In the first period 55 men worked less than the limit, 32 of them working 50 hours or less, whereas, they might have worked 77. In the next period there were 87. In the several pay periods throughout the contract the men working less than the limit were as follows: 88, 83, 64, 71, 54, 42, 31, 87, 125, 55, 76, 62, 46, 49, 48, 109, 124, and 94. This was out of a total averaging 139. In all the periods about 51 percent of plaintiff's men worked less than the limit, and about 22 per cent worked more. Only 27 per cent worked the limit, no more and no less. In the contract period plaintiff worked a total of 163,445 hours, whereas, it might have worked 190,890.

Krause offers as an explanation of this that when the work week was "reduced" to 35 hours the shop became "unsynchronized." He repeats this word a number of times, but what he means by it he nowhere explains. It is no explanation at all. In what he calls a "normal" workweek of 50 hours, he says all the employees worked 50 hours. If this be true, then plaintiff's operations are not of a character where one department normally works a less number of hours than another. Under the 35-hour week, therefore, all of plaintiff's employees could have worked at least the minimum. Fifty-one percent of them worked less than the minimum. Whether or not the National Industrial Recovery Act had been passed, plaintiff's plant would not have operated on a 50-hour week.

The allegations of plaintiff's petition are wholly unsupported by the evidence, and the new ground taken during the taking of testimony is likewise without foundation.

Plaintiff's petition will be dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

FRANKE B. ROBBINS, EXECUTRIX OF THE ESTATE OF OLIVER K. ROBBINS v. THE UNITED STATES

[No. 45398. Decided March 1, 1943]

On the Proofs

Pay and allowances; flying pay of qualified aerial observer during suspension under erroneously issued order.—Increased flying pay, to which commissioned officer in the Air Corps, U. S. A., is otherwise entitled under the statutes and Executive Order regulations, is not to be denied by reason of an order temporarily suspending him from flying duty where such order, which was subsequently revoked, is shown and admitted to have been erroneously issued, and declared and held by the Chief of the Air Corps and the Adjutant General, by the order of the Secretary of War, to be without effect.

Same; retroactive effect of order issued to correct an admitted administrative error.—Where the evidence shows that the temporary suspension order of May 5, 1937, was not issued because decedent was found to be unfit for flying duty under the pertinent regulations but solely because of a misunderstanding and misinterpretation of statements contained in a memorandum of the Adjutant General; it is *held* that there is nothing in the statutes or in the regulations contained in Executive Order No. 5865 which prohibits the Adjutant General and the Chief of the Air Corps, with the approval of the Secretary of War, from correcting an obvious error when it was discovered and retroactively ratifying and approving the aerial flights made by decedent in the regular course of his duties as an aircraft observer in conformity with regulations and proper orders and ratings theretofore issued and existing.

The Reporter's statement of the case:

Mr. M. C. Masterson for the plaintiff. *Messrs. Ansell, Ansell & Marshall* were on the brief.

Mr. Enoch E. Ellison, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. E. Leo Backus* was on the brief.

The plaintiff, as executrix of the estate of her husband, who prior to his death was a commissioned officer of the Air Corps of the Regular Army, sues to recover statutory flying pay at the rate of 50 per cent of his base and longevity pay for the period June 1 to October 7, 1937, while on duty,

as such commissioned officer, requiring him to participate regularly and frequently in aerial flights.

The only question is whether the increased flying pay is to be denied by reason of an order of May 5, 1937, temporarily suspending Captain Robbins from flying duty, but which order was subsequently revoked October 3, 1937, and declared and held by the Chief of the Air Corps and the Adjutant General by order of the Secretary of War to have been erroneously issued and without effect as depriving Robbins of flight pay to which he would otherwise be entitled.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The plaintiff, Franke B. Robbins as Executrix of the Estate of Oliver K. Robbins, deceased, claims increased flying pay of fifty per centum of his base and longevity pay as provided in Section 13 of the Act of June 4, 1920 (41 Stat. 759, 768), as amended by the Act of July 2, 1926 (44 Stat. 780, 781), for the period from June 1 to October 7, 1937. During the said period the deceased was a commissioned officer in the Air Corps, United States Army.

2. Oliver K. Robbins served as an enlisted man in the Aviation Section, Signal Enlisted Reserve Corps, from May 9 to August 13, 1918. He was appointed a 2nd Lieutenant, Air Service, United States Army, August 14, 1918, and accepted the same date. He vacated his emergency commission on September 17, 1920, by the acceptance on that date of an appointment as 2nd Lieutenant, Air Service, Regular Army, to rank from July 1, 1920. He was promoted to 1st Lieutenant March 14, 1921, to rank from July 1, 1920; to Captain August 30, 1934; to Major (temporary) October 12, 1937, and accepted October 14, 1937; and to Major July 10, 1940, to rank from July 1, 1940. His active commissioned service in the Air Service and Air Corps was continuous from August 14, 1918 to December 15, 1940, the date of his death.

3. Oliver K. Robbins was given the rating of airplane pilot, having received said rating by Personnel Orders No. 12, War Department, dated January 15, 1920, the pertinent part of which reads as follows:

1. The following named officers heretofore rated as Reserve Military Aviators are rated as Airplane Pilots, under the provisions of Paragraph 1584½, Army Regulations, effective October 16, 1919.

* * * * *

2nd Lieutenant Oliver K. Robbins, Air Service, Aeronautics

* * * * *

By direction of the Director of Air Service.

WM. F. PEARSON,
Colonel, A. S. A.,
Administrative Executive.

By:
RUSH B. LINCOLN,
Lieut. Colonel, A. S. A.,
Chief, Personnel Division.

4. He was rated Airplane Observer on June 27, 1930, by paragraph 1 of Personnel Orders No. 150, War Department, the pertinent part of which reads as follows:

1. The following Air Corps officers, are, under the provisions of Army Regulations 95–60, War Department 1929, and paragraph 3 (b), Circular 50–10, Office of the Chief of the Air Corps, dated February 19, 1930, rated Airplane Observer:

* * * * *

First Lieutenant Oliver K. Robbins, Air Corps,

* * * * *

By order of the Chief of the Air Corps:

W. G. KILNER,
Major, Air Corps,
Executive.

OFFICIAL:
PAUL J. MATHIS,
Captain, Air Corps,
Acting Chief, Personnel Division.

5. He was detailed to duty requiring regular and frequent participation in aerial flights as an observer on July 22, 1930, by Personnel Orders No. 169, the pertinent part of which reads as follows:

5. First Lieutenant Oliver K. Robbins, Air Corps, an aircraft pilot who is unfit for piloting duty, but who is a qualified aircraft observer, fit and desired for such duty, is detailed to duty requiring regular and frequent participation in aerial flights as an observer only.

This detail to duty involving flying requires participation in one or more of the following as an observer: Routine test flights and test flights of new or overhauled aircraft or their power plants, instruments, equipment or accessories; experimental development of aircraft or parts of aircraft or for experimental development of aviation instruments, equipment or accessories; administration or inspection purposes in connection with air work or for expediting the movements of personnel; flights duly authorized for the purpose of cooperation with other Governmental Departments; tactical maneuvers; and familiarizing himself or other flying personnel with the operation of types of aircraft, power plants, instruments, equipment or accessories with which they are inexperienced.

All orders issued in conflict with these orders are hereby revoked.

By order of the Chief of the Air Corps:

W. G. KILNER,
Major, Air Corps,
Executive.

OFFICIAL:
J. C. McDONNELL,
Major, Air Corps,
Chief, Personnel Division.

6. He qualified as an expert aerial bomber, and was so announced by Special Orders No. 67, War Department, dated May 8, 1936.

7. On February 26, 1937, he was classified by the Air Corps Flying Proficiency Board as capable and qualified for non-piloting duty in the Air Corps, and was required to continue his aerial experience and fulfill the legal requirements to draw flying pay, and was so advised by the Adjutant General by letter dated March 9, 1937, which letter reads as follows:

AG 201 Robbins, Oliver K.
(3–9–37)
SUBJECT: Classification.
THRU: Commanding General,
General Headquarters Air Force.
To: Captain Oliver K. Robbins, A. C.

1. The proceedings of the Air Corps Flying Proficiency Board have been approved by the Secretary of War as of February 26, 1937.

2. You are advised that you have been placed in Classification 5 *a* (2) (b), Circular 69, War Department, 1935, as amended by Circular 16, War Department, 1936, "Those capable and qualified for nonpiloting duty in the Air Corps. This nonpiloting group will include those deemed qualified for such duties as high command and staffs in the Air Corps, combat duties other than piloting, and officers of the engineer group and procurement-supply group of the Air Corps. They will be required to continue their aerial experience and fulfill the legal requirements to draw flying pay."

By order of the Secretary of War:

P. T. HAYNE,
Adjutant General.

8. On May 5, 1937, by Personnel Orders No. 103, War Department, Oliver K. Robbins and eighteen other officers were found professionally disqualified for flying duty and were temporarily suspended from such duty, the pertinent part of which said orders read as follows:

2. The following named Air Corps officers having been found professionally disqualified for flying duty, are hereby temporarily suspended from all duty requiring them to participate in regular and frequent aerial flights:

Colonel Lawrence S. Churchill.
Lieut. Colonel James F. Doherty.
Lieut. Colonel Thomas J. Hanley, Jr.
Major Arthur W. Brock, Jr.
Major Frank L. Cook.
Major Lewis A. Dayton.
Major Alonzo M. Drake.
Major Ray A. Dunn.
Major Benjamin F. Griffin.
Major Austin W. Martenstein.
Major Arthur J. Melanson.
Major Dache McC. Reeves.
Major Paul C. Wilkins.
Captain James W. Hammond.
Captain Park Holland.
Captain Jesse A. Madarenz.
Captain Oliver K. Robbins.
Captain Henry G. Woodward.
First Lieut. Joseph G. Hopkins.

The above-named Air Corps officers will remain suspended from all flying duty until such time as the

temporary suspension is removed by orders from this office.

By order of the Chief of the Air Corps:

M. F. DAVIS,
Lieut. Colonel, Air Corps,
Executive.

OFFICIAL:
G. L. USHER,
Major, Air Corps,
Chief, Personnel Division.

9. His suspension from flying duty as observer was removed by Personnel Orders No. 235, War Department, dated October 8, 1937, the pertinent part of which reads as follows:

4. Captain Oliver K. Robbins, Air Corps, having been found physically and professionally qualified for flying duty as observer, his suspension from flying duty per paragraph 2, Personnel Orders No. 103, Office of the Chief of the Air Corps, dated May 5, 1937, is removed insofar as flying duty as observer only is concerned. Captain Robbins will remain suspended from piloting duty until such time as he is found physically and professionally qualified for piloting duty, and suspension is removed by orders from this office.

By order of the Chief of the Air Corps:

M. F. DAVIS,
Lieut. Colonel, Air Corps,
Executive.

OFFICIAL:
G. L. USHER,
Major, Air Corps,
Chief, Personnel Division.

10. The temporary suspension of Oliver K. Robbins and eighteen other officers from flying duty was revoked by Personnel Orders No. 299, War Department, dated December 23, 1937, paragraph 7 of which reads as follows:

7. As directed in 13th Indorsement from The Adjutant General, dated September 20, 1937, file A.G. 201 Hanley, Thomas J. (5-21-37) and 15th Indorsement from The Adjutant General, dated October 20, 1937, file A.G. 201 Hanley, Thomas J. (5-21-37) A, Personnel Orders as listed below are hereby revoked:

Par 2, Personnel Orders #103, O.C.A.C., May 5, 1937
Par. 2, Personnel Orders #140, O.C.A.C., June 17, 1937

Par. 1, Personnel Orders #144, O.C.A.C., June 22, 1937
Par. 11, Personnel Orders #145, O.C.A.C., June 23, 1937
Par. 1, Personnel Orders #150, O.C.A.C., June 29, 1937
Par. 3, Personnel Orders #161, O.C.A.C., July 13, 1937
Par. 2, Personnel Orders #235, O.C.A.C., October 8, 1937
Par. 4, Personnel Orders #235, O.C.A.C., October 8, 1937
Par. 3, Personnel Orders #274, O.C.A.C., November 23, 1937.

By Order of the Chief of the Air Corps:

M. F. DAVIS,
Lieut. Colonel, Air Corps,
Executive.

OFFICIAL:
G. L. USHER,
Major, Air Corps,
Chief, Personnel Division.

11. The temporary suspension of Oliver K. Robbins and the other eighteen officers from flying duty by Special Orders No. 103, dated May 5, 1937, was due to an administrative error, and by order of the Secretary of War the Chief of Finance was advised that the said officers "will be certified" as qualified for flying pay during the period of such temporary suspension, provided they have otherwise met the requirements to entitle them to draw flying pay as set forth in a communication from the Adjutant General to the Chief of Finance (17th Ind.) dated December 31, 1937, the pertinent part of which reads as follows:

War Department, A. G. O., December 31, 1937.
To—The Chief of Finance

Attention is invited to the 13th, 15th, and 16th Indorsements hereon. The names of all Air Corps officers appearing in Paragraph 2, Personnel Order No. 103, Office of the Chief of the Air Corps, May 5, 1937, having been placed thereon due to administrative error, will be certified to the necessary disbursing officers as being qualified for flight pay during the period May 5–June 17, 1937, provided they have otherwise met the requirements of Paragraph 10, Executive Order of June 27, 1932.

By order of the Secretary of War:

P. T. HAYNE,
Adjutant General.

12. The "administrative error" referred to consisted of action taken in the War Department after receipt of erroneous information to the effect that Captain Oliver K. Robbins and certain other officers were qualified pilots but were being allowed extra flying pay for performance of nonpiloting duties, contrary to the provisions of Executive Order No. 5865, dated June 27, 1932. Such information was erroneous in that such officers were not then authorized to perform duties as pilots and therefore could not have been in the status of pilots, fit for duty as such. It had been determined by the Chief of the Air Corps that Captain Robbins was unfit for piloting duty. Acting upon the supposition that such information might be true, the Adjutant General, on March 10, 1937, issued a directive to the Chief of the Air Corps instructing the latter to require qualified aircraft pilots to fly as pilots and, as to the officers above mentioned, stating that "unless these officers are certified by you to be professionally unfitted for duty as pilots, they will be required to perform duty as pilots or they will be removed from flying status completely." See findings 5 and 7. Personnel Orders No. 103, dated May 5, 1937, finding 8, temporarily suspending such officers from flying were issued in supposed compliance with such directive, and not as a result of any opinion under paragraph 12 of Executive Order 5865 that such officers were unfit for the flying duties provided for by paragraph 3 of Executive Order No. 5865, except that it appears to have been the opinion of the Chief of the Air Corps from his interpretation of the language of The Adjutant General's directive that unless and until he was able to again certify, on the basis of new tests, that they were professionally unfitted for duty as pilots, the directive of the Adjutant General left him no choice but to remove them from flying status completely. Thereafter the Adjutant General ruled that the Chief of the Air Corps had misunderstood such directive and instructed him to take corrective action. As a result paragraph 7 of Personnel Orders No. 299, dated December 23, 1937, finding 10, was issued.

13. Captain Robbins was placed on flying duty by orders, finding 5, which were properly issued pursuant to paragraph

3 of Executive Order 5865 which provides that "such orders shall remain in force for the entire period of such commission, assignment, or attachment, except as hereinafter provided in paragraph 12." The orders originally issued under paragraph 3, *supra*, were never modified or revoked.

14. Paragraph 12 of Executive Order 5865 provides as follows:

> A commanding officer shall suspend from flying any officer, warrant officer, or enlisted man under his command who, in his opinion, is unfit for flying, except as a result of an aviation accident. Such action shall be reported with the reasons therefor for confirmation to the authority who issued the order requiring the officer, warrant officer, or enlisted man to participate regularly and frequently in aerial flights. The confirmation of such action shall have the effect of suspending the order to participate regularly and frequently in aerial flights of the officer, warrant officer, or enlisted man concerned from the date such suspension from flying was made. When any officer, warrant officer, or enlisted man, so suspended from flying, becomes, in the opinion of his commanding officer, again fit for flying, the commanding officer shall revoke his suspension from flying and such action shall be reported, with reasons therefor, for confirmation to the authority who confirmed the suspension from flying; the confirmation of such revocation shall have the effect of terminating the suspension of the officer, warrant officer, or enlisted man concerned from the date of such revocation by his commanding officer: *Provided*, That in the case of suspension from flying by reason of sickness or injury incurred in line of duty and the suspension is subsequently removed, such suspension shall be considered as nullified from its beginning and the individual concerned shall be entitled to increased pay for flying provided the requirements of paragraph 10 above are complied with.

15. The Chief of the Air Corps did not suspend Captain Robbins from flying duty as an observer (findings 5, 6, and 7) under paragraph 12 of Executive Order 5865 because "in his opinion" Robbins was "unfit for flying," but solely because of his misunderstanding of the "directive" from the Adjutant General which was based on erroneous information, as stated in finding 12.

16. By order of June 22, 1938, the Chief of the Air Corps declared and ordered the status of Captain Robbins to be the same as though he had never been temporarily suspended during the period May 5 to October 8, 1937, as follows:

> War Department Office, Chief of the Air Corps, Washington, D. C., June 22, 1938.
>
> To Commanding Office, Hamilton Field, California.
>
> Inasmuch as Paragraph 2, Personnel Orders No. 103, OCAC, dated May 5, 1937, and Paragraph 4, Personnel Orders No. 235, OCAC, dated October 8, 1938, were revoked by Paragraph 7, Personnel Orders No. 299, OCAC, dated December 23, 1937, Major Robbins' status is the same as though none of these orders had issued. He was, therefore, on the status of Observer during the period May 5, 1937, to December 23, 1937, and any flying done by him during this period, if otherwise correct, should be credited on Air Corps Form No. 5, toward minimum flying requirements, as outlined in War Department Circular No. 48, 1937, and Air Corps Circular 60–22, dated July 28, 1937.
>
> By order of the Chief of the Air Corps:
>
> V. B. DIXON,
> Lieut. Colonel, Air Corps,
> Executive.

17. The record of flights performed by Oliver K. Robbins as observer in Army Aircraft while on active duty in the Air Corps during the period of the claim (two of which on July 28, 1937, are shown by the record to have been under written order No. 126 of his Commanding Officer) and while he was still under the suspension prescribed by the erroneous personnel order, No. 103, is as follows:

Date	Number of Flights	Duration of Flights
June 19, 1937	1	1 hr. 45 min.
June 20, 1937	1	2 hrs. 45 min.
Total for June	2	4 hrs. 30 min.
July 27, 1937	1	2 hrs. 30 min.
July 28, 1937	2	3 hrs. 30 min.
Total for July	3	6 hrs. 00 min.
August	None	
Sept. 9, 1937	1	1 hr. 10 min.

Date	Number of Flights	Duration of Flights
Oct. 9, 1937	1	3 hrs. 35 min.
Oct. 10, 1937	2	3 hrs. 15 min.
Oct. 12, 1937	1	1 hr. 15 min.
Oct. 13, 1937	1	1 hr. 15 min.
Oct. 19, 1937	2	4 hrs. 15 min.
Oct. 20, 1937	1	3 hrs. 00 min.
Total for October	8	16 hrs. 35 min.

18. Paragraph 10 of Executive Order No. 5865 of June 27, 1932, prescribes the flight requirements for personnel of the Army, etc., who are required by competent authority to participate regularly and frequently in aerial flights as follows:

(a) During one calendar month.	10 *or more* flights totaling at least 3 hours, or in lieu thereof to be in the air a total of *at least* 4 hours.
(b) During 2 consecutive calendar months, when the requirements of subparagraph (*a*) above have not been met.	20 *or more* flights totaling at least 6 hours, or in lieu thereof to be in the air a total of *at least* 8 hours.
(c) During 3 consecutive calendar months, when the requirements of subparagraph (*b*) above have not been met.	30 *or more* flights totaling at least 9 hours, or in lieu thereof to be in the air a total of *at least* 12 hours.

19. For the period from June 1 to October 7, 1937, inclusive, Oliver K. Robbins was not paid increased pay for performing aerial flights, nor was anything paid to his estate on such account. He was paid an increase of fifty per centum of his base and longevity pay for flying during the period from October 8 to October 31, 1937.

If entitled to an increase of fifty per centum of his base and longevity pay by reason of performing aerial flights during the period from June 1 to October 7, 1937, inclusive, there is payable to the plaintiff the sum of $687.91.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover flying pay of Captain Oliver K. Robbins, Air Corps, Regular Army, for the period June 1 to October 7, 1937, in the amount of $687.91, under section 2 of the act of July 2, 1926 (44 Stat. 781) and section 3 of the act of June 16, 1936 (49 Stat. 1524). The 1926 act provided as follows:

> Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay when by orders of competent authority they are required to participate regularly and frequently in aerial flights, and when in consequence of such orders they do participate in regular and frequent aerial flights as defined by such Executive orders as have heretofore been, or may hereafter be, promulgated by the President. * * *.

Section 3 of the 1936 act provided as follows:

> A flying officer in time of peace is defined as one who has received an aeronautical rating as a pilot of service types of aircraft or one who has received an aeronautical rating as an aircraft observer: *Provided*, That in time of peace no one may be rated as an aircraft observer unless he has previously qualified as a pilot; * * *.

The facts show, and it is admitted, that Captain Robbins had the rating of a pilot and, also, that of an observer during the period of the claim for flying pay. This brought him within the definition of a flying officer. The facts also show, and it is admitted, that he was detailed to duty requiring regular and frequent participation in aerial flights as an observer (findings 5 and 7) and that he actually performed the aerial flights necessary to entitle him to draw flying pay as prescribed in paragraph 10 of the Executive Order of June 27, 1932 (findings 17 and 18). However, Captain Robbins was not paid the flying pay because of an erroneous personnel order, #103, issued by order of the Chief of the Air Corps May 5, 1937, temporarily suspending Captain Robbins from flying duty as a result of the misunderstanding or misinterpretation by the Chief of the Air Corps of a memorandum or "directive" received from the Adjutant General (see finding 12).

The evidence as disclosed by the official records of the War Department shows that during June, July, and Sep-

tember Captain Robbins regularly performed certain aerial flights as an observer in Army aircraft which, so far as the record shows, were made with the approval or on the orders of the Commanding Officer at Hamilton Field, California, and were placed in the records of his office. At least two of the flights performed on July 28, 1937, are shown to have been performed under written order No. 126 of his Commanding Officer.

Counsel for defendant contend (1) "That regardless of the authority of the War Department to revoke the suspension order *ab initio*, flights performed by deceased [Captain Robbins] when the suspension order was in effect were not performed 'in consequence of' orders requiring him 'to participate regularly and frequently in aerial flights' within the meaning of the statute, so as to entitle him to increased pay by reason of such flights; and (2) That paragraph 12 of the regulations set forth in the Executive Order, *supra*, does not authorize retroactive cancellation of suspension orders issued pursuant thereto, except in the instances expressly provided for therein, and accordingly the attempt of the War Department to vacate the suspension order *ab initio* did not have the effect of conferring retroactively the right to extra flight pay under the statute and Executive order."

We are of opinion that the temporary suspension order, which everyone concerned admitted and held was erroneously issued on May 5, 1937, did not under the peculiar facts of this case operate to prohibit the payment to Captain Robbins of statutory flying pay to which he otherwise became entitled under the statutes and the Executive Order regulations. The Adjutant General, by order of the Secretary of War, and the Chief of the Air Corps so declared and ordered after the erroneous suspension order had been revoked, and the Adjutant General, by order of the Secretary of War, directed that Captain Robbins be certified to the proper disbursing officer as being qualified for flight pay provided he had otherwise met the requirements of paragraph 10 of Executive Order No. 5865, which requirements, the evidence shows, Captain Robbins had met. In addition to this, the Chief of the Air Corps, after the erroneous suspension of personnel order #103 had been removed

by personnel order #235, October 8, 1937, issued personnel order #299, in which he revoked *ab initio* the erroneous temporary suspension order #103 and the personnel order #235 removing the erroneous suspension, and, in addition, notified the Commanding Officer at Hamilton Field, California, where Robbins was stationed on active duty as a flying officer, as follows:

> Inasmuch as Paragraph 2, Personnel Orders No. 103, OCAC, dated May 5, 1937, and Paragraph 4, Personnel Orders No. 235, OCAC, dated October 8, 1938, were revoked by Paragraph 7, Personnel Orders No. 299, OCAC, dated December 23, 1937, Major Robbins' status is the same as though none of these orders had issued. He was, therefore, on the status of Observer during the period May 5, 1937, to December 23, 1937, and any flying done by him during this period, if otherwise correct, should be credited on Air Corps Form No. 5, toward minimum flying requirements, as outlined in War Department Circular No. 48, 1937, and Air Corps Circular 60–22, dated July 28, 1937.

So far as appears this order was officially complied with.

We find nothing in the statutes or in the regulations contained in Executive Order No. 5865 which prohibited the Adjutant General and the Chief of the Air Corps, with the approval of the Secretary of War, from correcting an obvious error when it was discovered and retroactively, as they clearly did, ratifying and approving the aerial flights made by Robbins in the regular course of his duties as an aircraft observer in Army aircraft in conformity with regular and proper orders and ratings theretofore issued and existing. The evidence of record is sufficient to show, and we have found as a fact, that the Chief of the Air Corps did not issue the temporary suspension order of May 5, 1937, for a reason within the intent and purpose of paragraph 12 of Executive Order 5865, namely, because, in his opinion, Robbins was unfit for flying as an observer, but solely because of his misunderstanding and misinterpretation of certain statements contained in the memorandum of the Adjutant General. Except for that misunderstanding, no such suspension order would ever have been issued under paragraph 12 because, as a matter of fact and law, Robbins was

duly qualified and fit for the flying duty which he was performing, and which he did perform during and subsequent to the temporary suspension order, No. 103, of May 5, 1937. It is not, therefore, necessary to discuss the point whether the erroneous suspension order was legally issued and whether, if it was, the Secretary of War could retroactively revoke it so as legally to entitle the flying officer concerned to the statutory flying pay for aerial flights performed in accordance with regular orders and ratings theretofore issued. Of course the Secretary of War could not, in correcting an error, retroactively take any action which would entitle a flying officer to the statutory flying pay unless such flying officer had been in the air the required number of hours under paragraph 10 of the regulations relating to aerial flights contained in Executive Order 5865, but, in this case, he did not undertake to do so.

Plaintiff is entitled to recover and judgment will be entered for $687.91. It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

ARNOLD M. DIAMOND v. THE UNITED STATES

[No. 45420. Decided March 1, 1943]

On the Proofs

Government contract; change order; failure to appeal.—Where changes have been made under written change order of the contracting officer and no appeal therefrom has been taken to the head of the department as required by the contract, the terms of the change order govern and the contractor is not entitled to recover the amount by which the change order reduces the contract price.

The Reporter's statement of the case:

Mr. Frederic N. Towers for the plaintiff. *Mr. Norman B. Frost* was on the brief.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. March 12, 1940, the plaintiff entered into a contract with the defendant to furnish materials and perform the work for constructing and completing concrete and pile foundations for hangar at the Naval Aviation Patrol Base, Floyd Bennett Field, Long Island, New York, for the consideration of $22,217.00. The work was to be commenced within five calendar days after date of receipt of notice to proceed and to be completed within 60 calendar days from the date of receipt of notice to proceed. Liquidated damages for delay in completion of the work were fixed by the contract at $30 a day. The contract and specifications are plaintiff's Exhibit 1, which is made a part of this finding by reference.

The United States was represented by the Chief of the Bureau of Yards & Docks, Navy Department, as contracting officer, "acting under the direction of the Secretary of the Navy."

2. The existing topography required an hydraulic fill of approximately 5 feet in order to make the ground surrounding the proposed hangar site level with the adjoining Floyd Bennett Field. According to contract terms work was to be started on the concrete and pile foundations after another contractor had completed dredging operations in making the hydraulic fill. This procedure would have required excavation by plaintiff of the recently dredged earth.

3. Several days before the date of the contract, to wit, March 12, 1940, the plaintiff received notice from the defendant that the contract would be awarded to him.

4. March 8, 1940, plaintiff wrote the public works officer a letter which reads as follows:

> Award on the subject contract was received by me today.
>
> It is suggested that you consider permitting me to install the foundations before hydraulic fill is made by other contractors. This would be of mutual advantage since it would permit the earlier completion of the work under contract.
>
> I could guarantee that this would in no way delay or interfere with the contractor for the bulkhead and fill.

5. March 13, 1940, the public works officer wrote to plaintiff a letter which reads as follows:

> This is to advise that you will be given notice to proceed with work under your contract for foundations for hangar, Floyd Bennett Field, Specification 9554, immediately upon receipt by you of the executed contract, permitting you to proceed with your work before the placing of the hydraulic fill under another contract.
>
> This will constitute a change of contract, and will be the cause of a reduction in contract price and time for completion, which will be made as provided for by article 4 of the contract.
>
> You will receive formal change order covering this change in contract conditions as soon as authorization is received from the Bureau of Yards and Docks.

6. March 13, 1940, plaintiff wrote to the public works officer a letter which reads as follows:

> The following is the break-down of estimated saving in cost to install the foundations with the grade as existing; the average existing grade being computed as 109.1, for purpose of estimating, 109.0.
>
> Excavation omitted: 7,130 cu. yds.

Steam shovel hire per day	$75.00
Engineer	16.00
Fireman	12.00
Fuel	8.00
Comp. Ins., Social Security per day	2.00
Per day	113.00
Steam shovel 7 days at $113.00	791.00
Less additional handling of concrete, 580 cu. yds. at $0.75	435.00
Net estimated saving	356.00

7. March 19, 1940, the public works officer wrote plaintiff a letter, directing him to proceed with the work under contract. This letter was received by plaintiff on March 20, 1940, and immediately plaintiff began the work.

8. March 20, 1940, the public works officer wrote to plaintiff a letter which reads as follows:

> In order to provide a pipe tunnel on the north side of the seaplane hangar, it is proposed to leave channelways in certain of the footings under the contract named above. These channelways are detailed on the enclosed prints in red. On the south side of the hangar, to provide for future work, it is proposed to cut off two interior dowels as indicated.

It is requested that you furnish at the earliest practicable date, an estimate of change in contract price for the omission of the concrete and dowels indicated above.

9. March 25, 1940, plaintiff wrote to the public works officer a letter which reads as follows:

> With reference to the omission of portions of the concrete piers, as per your letter of March 20, 1940, the following is an itemized account of the estimated saving in cost:
>
> | | |
> |---|---|
> | Concrete omitted, 14 yds. at $9.00 | $126.00 |
> | Steel omitted, 229# at $.035 | 8.00 |
> | Total saving | 134.00 |
> | Less additional forms for concrete, 277 sq. ft. at $.36 | 99.00 |
> | Net saving | 35.00 |

10. March 29, 1940, under article 3 of the contract and paragraph 27 of the general provisions, a Board on Changes was appointed, composed of two Naval Officers appointed by defendant and one member appointed by plaintiff. This Board was convened to consider any appropriate change in contract price and time for performance due to

> (a) Reduction in amount of excavation from that required by Specification 9554 due to contractor being authorized to proceed with the work under the contract before placing of dredged fill under another contract; and
>
> (b) Provision of channelways in X_1 footings and omission of two center dowels above top of footings in X footings to provide for future air duct.

11. The Board on Changes convened promptly to consider the matter submitted. A majority report, concurred in by the two Naval Officers, was submitted on April 2, 1940. A minority report was submitted by plaintiff's representative on April 9, 1940. Paragraph 4 of the majority report reads as follows:

> The Board recommends that for item (a) the contract price be reduced $1,096.80 and the contract time for completion be reduced nine (9) calendar days, and for item (b) the price be reduced $188.33 making a total reduction in contract price of $1,285.13 and a reduction in contract time of 9 calendar days. The estimates of the Board are attached hereto.

The minority report recommended a reduction on item (a) of $45.50, on item (b) of $62.97, and no reduction in contract time.

12. May 7, 1940, the contracting officer issued Change Order "A". In Change Order "A" the contracting officer adopted the recommendations of the majority of the Board on Changes and reduced the contract price by the sum of $1,285.13 and the time for the completion of the contract 9 calendar days. A copy of the Change Order is in evidence as plaintiff's Exhibit No. 10 and is made part hereof by reference.

13. June 6, 1940, the plaintiff wrote the contracting officer a letter which reads as follows:

> Reference is made to change order "A" under the subject contract, and your formal order dated May 7th which was forwarded to me and reached me on May 15th. In this order the contract price is reduced by the sum of $1,285.13 and by 9 days in contract time.
>
> It is requested that this change order be reviewed inasmuch as actual costs kept on this work show an increase of cost and an increase of time required for performance.
>
> If you will review this matter, I shall be glad to send you full information at your request.

The foregoing letter was forwarded by the contracting officer to Rear Admiral Ralph Whitman, Public Works Officer, who on June 13, 1940, wrote plaintiff a letter in which plaintiff's request to have Change Order "A" reviewed was by him denied.

Plaintiff took no appeal to the Secretary of the Navy.

14. An error in computation made by the majority of the Board on Changes on item (b) was incorporated in Change Order "A." The saving as erroneously computed was $188.33, which, to be correct, should be reduced by $47.79. This in turn reduces the sum of $1,285.13, referred to in finding 12, to $1,237.34, which is supported by the evidence. At the time the testimony was introduced the defendant conceded this error and that there was an overreduction of the contract price in Change Order "A" in the sum of $47.79.

During the course of the work there was a strike by certain workmen extending from April 30, 1940, to May 3, 1940.

How much this strike delayed plaintiff's entire work is not proved.

15. The work was completed by plaintiff on May 24, 1940. Defendant withheld as liquidated damages for delay of 14 days in completion of the work at $30 a day the sum of $420.00.

16. June 6, 1940, plaintiff executed a release which contains the following provision:

> excepting the sum of Four Hundred and Twenty ($420.00) Dollars which has been deducted for liquidated damages, and a sum not to exceed Two Thousand ($2,000.00) Dollars, being the difference between the amount deducted under change "A" and the amount that should have been added under the change "A."

The court decided that the plaintiff was not entitled to recover for the amount by which the contract price was reduced nor for liquidated damages withheld for delay in completion, as provided in the change order, and that plaintiff was entitled to recover for amount deducted through an error in computation.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The contract sued on here is for foundations for a seaplane hangar at the Naval Aviation Patrol Base, Floyd Bennett Field, Long Island, New York. As set forth in the brief, plaintiff's claim is for recovery of liquidated damages withheld for delay, $420, and for recovery of an erroneous charge of $47.79 in a change order, a total of $467.79.

The Government had planned to bring the area involved to the proper grade and level by an hydraulic fill before plaintiff's work was to begin. Since plaintiff's work required excavation for foundations, plaintiff, before the work got under way, suggested to the public works officer that his own work, contrary to the original plan, precede the hydraulic fill. This suggestion received favorable consideration and March 19, 1940, before the hydraulic fill had commenced, the public works officer directed plaintiff to proceed, having previously informed him that the change in order of work would reduce the contract price and time

for completion, but that a formal change order awaited the authorization of the Bureau of Yards & Docks.

Plaintiff proceeded with the work and continued therewith until on May 7, 1940, the contracting officer (Chief of the Bureau of Yards & Docks) issued a change order reducing the contract price by $1,285.13 and the time for completion by 9 calendar days. The original time for completion being May 19, 1940, this fixed the new time for completion May 10, 1940. Plaintiff did not complete until May 24, 1940, five days later than the original time, 14 days later than the reduced time.

The amount by which the contract price was reduced is, except for a conceded error of $47.79, supported by the evidence. With the reduction in contract price the contracting officer reduced the time for performance. Both reduction in contract price and reduction in time were included in the order providing for the change in work, and this order the contracting officer had the power under the contract to make. The plaintiff was dissatisfied with the terms of the change order, but took no appeal to the head of the department and his failure to do so ended the matter.

The plaintiff is entitled to recover $47.79 and judgment will be in that amount.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

JONES, *Judge,* took no part in the decision of this case.

EDMUND J. RAPPOLI COMPANY, INC., v. THE UNITED STATES

[No. 44475. Decided March 1, 1943]

On the Proofs

Government contract; error by contractor in calculation on which amount of bid was based discovered before execution of contract; promise of contracting officer that error would be corrected.—Where an error by contractor in calculation on which amount of bid was based was discovered before execution of contract and promise was made by Government contracting officer that mistake would be corrected if proof of mistake was submitted through regular channels, which was done; plaintiff is entitled to recover.

Same; equity of claim obvious and proof adequate.—The equity of plaintiff's claim is obvious, and the proof that a mistake was made is adequate; the fact not having been denied by the War Department, which recommended its correction.

Same; fair dealing by Government.—An entity such as a government, which acts through many agents, must so coordinate the activities of its agents that the sum of their actions is up to the standard of fair dealing that is required of common men. *Struck Construction Co.* v. *United States,* 96 C. Cls. 186.

Same; parol evidence rule.—The parol evidence rule does not prevent a court from enforcing a promise made, concurrently with the execution of a contract, to correct a mistake in that contract, it being to the convenience of both parties that the contract, without the correction, be executed at the moment while time is taken to correct the mistake.

Same; condition of contracting officer's promise met.—If the promise of the Government's contracting officer that the mistake in the contract would be corrected was made with the condition that plaintiff should put its claim and proof of mistake through "regular channels"; it is *held* that plaintiff satisfied the condition.

Same.—If the promise of the Government's contracting officer that the mistake in the contract would be corrected was made with the implied condition that plaintiff's proof of mistake should be convincing to the officials of the Department with which plaintiff was dealing; it is *held* that such implied condition, if any, was fulfilled, as shown by the Department's favorable recommendation.

Same; information withheld from plaintiff; failure to put "findings and recommendations" in evidence.—A condition that plaintiff's proof of mistake should be convincing to an official of another department of the Government, with whom plaintiff was not dealing, could not be spelled out from silence or from such words as "regular channels"; where plaintiff was not informed that his proof would be submitted to such other department; and where the "findings and recommendations" submitted to such department are not in evidence.

Same; reasonable meaning and legal effect of contracting officer's promise to correct mistake.—The reasonable meaning and the legal effect of the promise of the contracting officer, as understood by plaintiff, was that the mistake in the contract would be corrected if it was put through the routine of the War Department and if there was no legal impediment to its correction; and these conditions having been fulfilled the Department could have itself corrected the mistake and should have done so.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. Harry D. Ruddiman* and *Messrs. King & King* were on the brief.

Mr. Philip Mechem, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff, a bidder for the construction of an armory for the Government at West Point, submitted its formal sealed bid before the day the bids were to be opened and took advantage of the privilege offered in the invitation to bid of sending in by telegram a modification of the bid on the day the bids were opened. In the calculations on which the figures in the telegraphic modification, relating to the construction of caissons, were based an error was made by plaintiff, affecting the amount of the bid adversely to plaintiff. Even before such modification and reduction of said bid plaintiff's formal bid was the lowest bid submitted; and it was immediately apparent to the Government's constructing quartermaster that plaintiff's caisson bid was, in some way, in error. Plaintiff, upon being notified the following day that its bid was the low bid and that the bid was being forwarded to the War Department, in checking the figures discovered the error in the caisson figures; and thereafter in conferences with constructing quartermaster and his superior, who was the contracting officer, plaintiff was assured that the error was recognized and would be corrected upon the submission of a conclusive showing of mistake to be submitted through proper channels. Relying upon such assurance plaintiff executed the contract and performed the work in accordance therewith, after promptly submitting the required conclusive showing of mistake, which was forwarded by the War Department with recommendation to the General Accounting Office that the error be corrected. The Comptroller General ruled that the error would not be corrected, of which ruling plaintiff was not informed before signing the contract and beginning the work. The court held that plaintiff was entitled to recover.

The court made special findings of fact as follows:

1. Plaintiff is a Massachusetts corporation with its principal place of business in Cambridge. It is engaged in the general contracting business.

FIRST CAUSE OF ACTION

2. February 15, 1937, the defendant advertised for bids for construction of a Cadet Armory at the United States Military Academy, West Point, New York. The specifications, which were admitted in evidence as Plaintiff's Exhibit No. 2 and are made a part hereof by reference, under the heading "Explanation of Base and Alternate Bids" provided for three alternate base bids, "A," "B," and "C," which were designated in the Standard Government Form of Bid as Items I, V, and IX, respectively. The three bids were based on three proposed lengths for the armory.

The specifications also called for three alternate bids under each base bid, and Alternate No. 1, the only one pertinent to this case, provided for the substitution of caissons for the spread footings specified in the base bids.

Base bid "C" was Item IX of the bid form, covering construction of the longest of the three buildings proposed, and Item X of the bid form was the first alternate under base bid "C."

3. The Standard Government Instructions to Bidders, which plaintiff's president received and read along with the bid form before submitting any bid, contained the following provision:

> 19. *Errors in bid.*—Bidders or their authorized agents are expected to examine the maps, drawings, specifications, circulars, schedule, and all other instructions pertaining to the work, which will be open to their inspection. Failure to do so will be at the bidder's own risk, and he can not secure relief on the plea of error in the bid. In case of error in the extension of prices the unit price will govern.

4. March 15, 1937, plaintiff submitted a bid to the Constructing Quartermaster, United States Military Academy at West Point, in which it fixed $620,000 as its price for base bid "C," Item IX, and $14,000 as its bid price for Item X. These figures were approximations arrived at with the intention that they would be modified by telegraph just prior to the opening of the bids in accordance with the practice in the construction industry which was followed

in plaintiff's office. Under this practice the materialmen and subcontractors hold back their bids to the general contractor until the morning set for opening bids in order to take advantage of the lowest market prices then prevailing. On the basis of bids from his subcontractors and materialmen, the general contractor revises his original proposal on the morning the bids are opened and then telegraphs his modification to the owner. Article 13 of the Standard Government Instrutcions to Bidders provided that consideration would be given to telegraphic modifications of bids if the telegrams were received prior to the hour set for the opening of bids.

5. Item XIII of the bid form was on a mimeographed sheet of paper which, before any writing or figures were inserted by plaintiff, appeared as follows:

> ITEM XIII. *Unit Prices.*—The contractor shall submit "Unit Prices" on the following schedule for all items listed below. These will be used in making deductions from or additions to the contract amount, provided any deviation from the drawings and specifications decreases or increases the work indicated or required.
>
> Unit prices shall include the furnishing of all labor and material, complete in place, unless otherwise noted:

Item		
(a) Earth excavation........	Dollars ($)	per cu. yd.
(b) Rock excavation........	Dollars ($)	" " "
(c) Wet excavation..........	Dollars ($)	" " "
(d) Type "B" Concrete......	Dollars ($)	" " "
(e) Type "C" Concrete......	Dollars ($)	" " "
(f) Caisson Work, includes excavation, pumping, sheet piling or other forms and concrete in place	Dollars ($)	" " "
(g) Form work.............	Dollars ($)	" sq. ft.
(h) Structural Steel.........	Dollars ($)	" ton.
(i) Reinforcing Steel........	Dollars ($)	" "
(j) Common Brick in Walls.	Dollars ($)	" M
(k) Face Brick in Walls....	Dollars ($)	" "
(l) 8″ Concrete Masonry Units in Walls.......	Dollars ($)	" sq. ft.

(m) 4″ Concrete Masonry Units in Walls_______	Dollars ($	)	per sq. ft.
	Dollars ($	)	" " "
(n) 4″ Salt Glazed Tile Partitions____________	Dollars ($	)	" " "
(o) 4″ Sub-soil Drain______	Dollars ($	)	" lin. ft.
(p) 6″ Vitrified Clay Pipe__	Dollars ($	)	" " "

6. Although the specifications and bid form called for a unit price per cubic yard for the caisson work, plaintiff's previous experience in bidding on such work had been to figure unit costs on the basis of lineal feet. It was customary for contractors to use this method because most of the expense of caisson work arises from the difficulty of working in a restricted space and from the pumping and labor necessary in excavation rather than from the cost of materials used.

On filling in Item XIII (f) of the bid form on March 15, 1937, Edmund J. Rappoli, president of plaintiff company, inadvertently set down a price of $30 per cubic yard, whereas he intended to bid $30 per lineal foot. To have correctly shown the bid intended, it would have been necessary for Rappoli to write the words "per lineal foot" across the ditto marks appearing on the bid form opposite Item XIII (f).

7. The bids for the construction of the armory were to be opened at West Point at 11 a. m. on March 16, 1937. In accordance with the custom heretofore described, plaintiff waited for the morning mail that day before submitting its telegraphic modification of its bid. The mail usually arrived about 8:30 a. m., and, when it had not been delivered at 9:30 a. m., plaintiff's president telephoned the Post Office and learned that there was a new mail carrier on the route. Rappoli and several employees then set out in search of the mail man and on finding him obtained plaintiff's mail, consisting of about 100 letters. Plaintiff's office force first engaged themselves in revising the original bid on another job upon which the bids were to be opened at 10 o'clock that morning. Plaintiff had expected to receive bids from subcontractors for the caisson alternates for the armory, but the mail contained none and it became necessary for plaintiff's office force to hurriedly compute the price which it

would bid for this item. In the limited time available they decided to figure the same price for all three caisson alternates, using as a basis the alternate to base proposal "C," which called for the largest building, with no deductions for the alternates to the smaller base bids. An engineer employed in the office calculated that there would be 1,017 lineal feet of caissons and gave this figure to Rappoli, who personally figured the bid for the caisson alternate (Item X of the bid form). Based on his past experience, Rappoli determined that the unit cost for the caissons would be approximately $30 per lineal foot. On a hasty computation he erroneously figured 1,017 lineal feet of caissons, at $30 per lineal foot as amounting to $10,510, instead of the correct figure of $30,510. His calculation shown on the original work sheet used at the time was as follows:

Caisson Work	Cadet Armory
48 & 60'' Cassions 1017 L' at 30. Avge	10,510
Rein steel in fdns	1,151
Rein steel setting 17 T at 20	340
Additional fdn. concrete 30 Cy at 8	240
	12,241
Ins	2,000
O & P	3,000
	17,241

As used in the foregoing writing "Rein" meant reinforcing, "fdn" meant foundation, "Ins" meant insurance, and "O & P" meant overhead and profit.

8. In the final revision of the original bid, Rappoli decided to reduce the figure of $17,241 to $17,000 to make a round figure. At 10:44 a. m. plaintiff dispatched a telegram to the Constructing Quartermaster modifying 12 items in its original bid. The telegram stated that $88,282 should be deducted from Item IX and $3,000 should be added to Item X, the caisson item. At the top of the telegram appeared the notation: "To be delivered before 10:55 a. m."

9. The figures of $1,151 for reinforcing steel, $340 for labor, and $240 for additional concrete would have remained the same had Rappoli made no error in his computation, since these items bore no relation to the dollar price of the work.

However, the figures for insurance and overhead and profit were based upon the total price in dollars of the first four items, so that if the error had not been made the figure for insurance would have been raised to $6,500 and the amount for overhead and profit increased to $7,500. The correct computation on that basis would have been as follows:

Caisson Work	Cadet Armory
48 & 60'' Caissons 1017 L' at 30. Avge	30, 510
Rein steel in fdns	1, 151
" " setting 17 T at 20	340
Additional fdn. concrete 30 Cy at 8	240
	32, 241
Ins	6, 500
	38, 741
O & P	7, 500
	46, 241

10. Capt. John A. Gilman, the Constructing Quartermaster at West Point, advertised for and opened the bids and supervised the construction after the contract was executed. After Captain Gilman had begun but before he had concluded the opening of the bids on March 16, 1937, he received and read plaintiff's telegram modifying its bid. Plaintiff's bid, even before the modification, was the lowest one received, and the telegram decreased its original bid by the sum of approximately $90,000, or from $620,000 to about $530,000.

Upon reading the bids, Captain Gilman realized that plaintiff had made an error in submitting its bid of $17,000 for the caisson alternate (Item X), because the other three bids received for the same item were in the amounts of $48,000, $60,000, and $68,000, respectively.

Captain Gilman had no authority to award the contract but he sent the bids to Washington the same day and called the office of the Quartermaster General by telephone, submitting information on the results of the bid opening. March 17, 1937, Captain Gilman wrote plaintiff that it was the low bidder on the armory and that its proposal had been forwarded to the office of the Quartermaster General. This letter was received on March 18, 1937, and on the same day, Rappoli, in going over his figures, discovered the error

made in plaintiff's bid. He immediately telephoned Captain Gilman that a serious mistake had been made in the bid for the caisson alternates and requested that the award be made on the basis of the spread footings instead of the caissons. A conference was arranged with Captain Gilman for the next day, March 19, 1937, at West Point. On March 19 Captain Gilman received instructions from the Quartermaster General's office to award the contract to Rappoli. That office was not then aware of plaintiff's claim that a mistake had been made.

11. Rappoli and his attorney appeared at West Point on March 19, 1937, and first questioned Captain Gilman's authority to accept the telegraphic modification after the time for receiving bids had passed. Captain Gilman took the position that, since the telegram revised a bid that was already low, he had authority to accept it. He also informed plaintiff that he desired to have the contract provide for caissons instead of spread footings and had made this recommendation to the Quartermaster General. There followed a discussion by the parties regarding plaintiff's erroneous bid. Captain Gilman admitted that a mistake was obvious in view of the disparity between plaintiff's bid and the other bids received, but informed Rappoli that he would be required to submit documentary evidence of the error claimed to the proper authorities. Captain Gilman then arranged a conference to discuss the question at the office of the Quartermaster General in Washington, D. C., on March 24, 1937. The award of the contract was deferred pending the Washington conference. March 20, 1937, Captain Gilman wrote Rappoli, requesting that he bring to the conference all pertinent data regarding the alleged error in the bid, including the original work or estimate sheets, for presentation to the contracting officer. His letter reads in part as follows:

> In this connection your attention is invited to the Comptroller General's Decision No. A-82037 published in Decisions of the Acting Comptroller General of the United States, Volume 16, December, 1936, wherein he states that there is no authority for the correction of a mistake in bid, or for its withdrawal, where the mistake is alleged after the opening of the bids except upon a

conclusive showing that a bona fide mistake was made, and that a mere allegation of error is not conclusive evidence of a mistake.

12. March 24, 1937, Rappoli and his attorney attended the conference at the Quartermaster General's office in Washington. The Quartermaster General was represented by Colonel Pitz, the contracting officer. Captain Gilman and some other officials of the War Department were present. Two questions were discussed by the parties at this conference: (1) The authority of the Government to accept the telegraphic revision of the bid after the time for opening bids had passed, and (2) the error in plaintiff's bid on Item X. On the first question Colonel Pitz stated that the Government had the authority to accept the late revision in the bid since plaintiff's original bid was the lowest received. On the second question plaintiff submitted its proof of mistake, consisting of an affidavit, the original estimate sheets, and the piece of paper on which the mistake in computation had been made.

During this discussion Captain Gilman handed plaintiff the award of the contract for the construction of the armory. When the award was opened it was discovered that it was made on the basis of plaintiff's original bid and telegraphic modification, whereupon Rappoli and his attorney objected to the award on that basis prior to correction of the error claimed. Colonel Pitz informed plaintiff's representatives that it was not the policy of the War Department to take advantage of mistakes made by contractors, and stated that the error could be rectified provided satisfactory proof thereof was submitted through the proper channels. Plaintiff's representatives were advised that such proof should first be submitted to Captain Gilman who would in turn refer it, with his recommendations, to the Quartermaster General's office. The defendant's representatives contemplated that the question would be submitted, with their findings of fact and recommendation, to the Comptroller General for decision. They did not tell plaintiff's representatives that they so intended, and plaintiff's representative supposed that the question would be decided in the War Department.

Both parties were anxious to proceed with the contract without further delay to safeguard against an expected increase in the cost of labor and materials. Plaintiff's representatives agreed to execute the contract, but said they would expect the mistake to be corrected. It was understood that when a favorable decision was obtained on the question of mistake, the correction thereof would take the form of a change order to the contract. The conference was temporarily adjourned while plaintiff's attorney, with some assistance from defendant's representatives, prepared a letter to Captain Gilman urging relief on account of the mistake made. This letter with the accompanying evidence supplied by plaintiff was then delivered to Captain Gilman.

13. Captain Gilman thereafter transmitted plaintiff's letter and documents of proof regarding the mistake to the Quartermaster General's office with the recommendation that consideration be given to correction of the error. Captain Gilman recognized that there had been an error.

There was no direct evidence showing what recommendation the Quartermaster General made with respect to plaintiff's claim when it was transmitted to the General Accounting Office. However, on April 5, 1937, the following radiogram was sent from the office of the Quartermaster General to the Constructing Quartermaster at West Point:

> Prepare contract covering construction and completion of Cadet Armory as awarded to Edmund J. Rappoli Company, Incorporated, in the amount of Five Hundred Eighty-nine Thousand Seven Hundred Eighteen Dollars Stop Have it executed by the contractor and forward to this office for completion Stop If the Comptroller General favorably considers the recommendation that the contractor be permitted to correct the alleged errors in its proposal comma reformation of the contract can be accomplished by change order.

14. A copy of the radiogram accompanied copies of the contract which Captain Gilman, on April 5, 1937, forwarded to plaintiff for execution.

Plaintiff executed the contract on April 9, 1937, relying upon defendant's assurance of relief given at the conference of March 24, 1937. Plaintiff was unaware of any powers the Comptroller General might have in the matter; it had

had no previous experience with that office and assumed that the reference to that office was merely a part of the procedure through which the matter would have to go to accomplish the relief that plaintiff understood it was to obtain when it visited the War Department.

The contract was dated March 19, 1937, because Captain Gilman began its preparation at that time and did not correct the date later. The contract provided for construction of the armory in accordance with plaintiff's proposal on Items IX, X, XI, and XIII as modified by telegram, and was signed by H. E. Pitz, Lieutenant Colonel, Quartermaster Corps, as contracting officer for the Government. The notice to proceed with the work was issued March 30, 1937. Under the terms of the contract plaintiff was required to commence work within seven calendar days from the date of receipt of notice to proceed. Plaintiff waited until April 12, 1937, or until after the contract was executed, before he acknowledged receipt of this notice.

15. Relying on the statements made to its representatives at the conference in Washington on March 24, 1937, plaintiff began purchasing materials and letting subcontracts during the latter part of March and the early part of April 1937. The structural and reinforcing steel was purchased and plaintiff obligated itself to various subcontractors in the sum of approximately $175,000. Work was started April 9, 1937, and equipment moved on the job at that time.

16. April 6, 1937, three days before the contract was executed by plaintiff, the Comptroller General issued a ruling to the War Department that no payment in excess of the contract price would be authorized from appropriated moneys on the basis of the alleged error made by plaintiff in computing the caisson estimate under Item X of its bid proposal. This decision rested largely upon the Comptroller General's statement that "If any bona fide error occurred therefore—which is by no means accepted as established upon the record presented—it was due to the inattention and carelessness of the bidder and was not reported until after the bid was accepted."

17. Plaintiff did not learn of this decision until April 22, 1937, when it was transmitted in Captain Gilman's letter

of that date. In addition to the obligations which plaintiff had already entered into for materials, subcontracts had been signed, excavation, blasting, and caisson work had started, and money had been expended for labor. Plaintiff could not have suspended work on the contract at that time without substantial loss to it.

18. May 13, 1937, plaintiff submitted to Captain Gilman a formal request for reconsideration of the Comptroller General's decision, and asked that he present it to the Comptroller General. June 14, 1937, Captain Gilman replied to this request inclosing a copy of the letter from the Acting Comptroller General under date of June 8, 1937, in which the decision of April 6, 1937, was affirmed.

19. December 21, 1937, plaintiff's attorney presented a formal claim for direct settlement to the General Accounting Office, calling particular attention to the fact that the Comptroller General's finding of April 6, 1937, as to the time plaintiff reported the alleged mistake, was erroneous, because the error was reported on March 18, 1937, whereas the award was not made until March 24, 1937. When no reply was received, plaintiff's attorney renewed his request on September 2, 1938. September 14, 1938, the Acting Comptroller General issued a settlement certificate again rejecting the claim, stating that the records of the War Department showed that the alleged error was not reported until after plaintiff received the award of the contract.

20. After further requests for review had been made on September 21, 1938, and October 19, 1938, the Acting Comptroller General made his final decision on the claim January 9, 1939. His decision, in evidence as Plaintiff's Exhibit 23 and made a part hereof by reference, stated that the War Department had submitted additional information verifying plaintiff's contention that the alleged error had been reported before the award was made. However, the claim was again denied on other grounds.

21. Plaintiff's employee who before plaintiff submitted its bid computed the number of lineal feet of the caissons for Rappoli and told Rappoli there were 1017 lineal feet, made a mistake. The actual number of feet was 887. If, therefore, Rappoli had correctly multiplied the intended $30 per lineal

foot by 887 he would have put down $26,610, rather than $10,510 on his work sheet. This mistake was never discovered until the hearing in this case. Eliminating plaintiff's mistake as to the number of lineal feet, and his error in multiplication, and using the same percentages for insurance and for overhead and profit that plaintiff used in its mistaken bid, and adjusting these items and the total to the nearest $500 to make round figures as plaintiff did in his erroneous bid, we find that plaintiff's work sheet would have been as follows:

Caisson Work—Cadet Armory

48 & 60″ Caissons 887 L′ at 30. Avge	26, 610
Rein Steel in fdns	1, 151
Rein Steel setting 17 T at 20	340
Additional fdn. concrete 30 Cy at 8	240
	28, 341
Ins	4, 500
	32, 841
O & P	6, 500
	39, 341

Plaintiff's bid would have been $39,000.

22. When the work under the contract was completed, plaintiff executed a formal release of all claims against the Government except its claim for relief based on the error in its bid. The difference between the amount of plaintiff's bid and the amount it would have bid but for the two mistakes made is $22,000. Plaintiff has not been paid any portion of this claim.

23. Plaintiff has withdrawn the second cause of action stated in its petition.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff was a bidder for the construction of an armory for the Government at West Point. It had sent in its formal sealed bid before the day the bids were to be opened, intending to take advantage of the privilege offered in the invitation to bid of sending telegraphic modifications in time to be received before the hour set for opening the bids, which was 11 a. m. on March 16, 1937.

In addition to the bid on the principal project, on which plaintiff's first figure was $620,000, plaintiff made a first bid of $14,000 on an alternate, given in the invitation, for concrete caissons instead of spread concrete footings for the foundation of the armory. Plaintiff intended to subcontract the caisson work, if it obtained the contract, and intended to use the offers of subcontractors as the basis of its telegraphic modification of this alternate. It, therefore, made no careful estimate in arriving at the $14,000 figure in its bid on the caisson alternate.

It was the custom of tradesmen in specialized lines, who desired to obtain subcontracts on such projects, to learn from trade papers the time of opening of bids, and to submit, without invitation, offers to contractors for the subcontracts. They withheld these offers until the last mail so as to reflect in them the latest available prices.

Plaintiff had also bid on another project of another owner of which the time for opening bids was 10 a. m. on the same day, March 16. Plaintiff's morning mail usually was delivered at 8:30, and it wanted to see what offers from subcontractors were in that mail. The mail was late, because of a different carrier, and Rappoli, president of plaintiff, and others of his office staff went out and intercepted the mail man and got from him about 100 letters. Then they worked on the 10 o'clock bid. When they got to the 11 o'clock bid, here in question, they made modifications reducing the principal bid from $620,000 to some $530,000. As to the caisson alternate, there were no offers from subcontractors, so they had to figure out a final bid without the benefit of such offers.

An employee computed that there would be 1017 lineal feet of caissons, and Rappoli had in mind a figure of $30 a lineal foot for them. By an error of multiplication, or of transcribing figures, he set down as his product $10,510 instead of $30,510, the correct product. He then added to that figure the items shown in finding 7, which gave him a sum of $17,241. He rounded that to $17,000 and put into his telegram an increase of $3,000 over his earlier bid of $14,000 on the caisson alternate. The telegram was sent at

10:44 a. m. and arrived at West Point after 11 a. m. but while the opening of the bids was still proceeding.

Even plaintiff's first bid of $620,000, which it reduced by $90,000 in its telegram, was lower than any other bid. On the caisson alternate, plaintiff's telegraphed bid was, as we have seen, $17,000. The other three bidders bid $48,000, $60,000 and $65,000 respectively on this alternate. Captain Gilman, the defendant's constructing quartermaster at West Point was immediately aware that plaintiff's caisson bid was, in some way, in error.

Captain Gilman telephoned to the Department in Washington the day he opened the bids, and mailed the bids to Washington the same day. The next day, March 17, he wrote plaintiff that it was the low bidder and that its bid had been forwarded to the office of the Quartermaster General. Plaintiff received this letter on March 18, and Rappoli, in going over his figures, discovered the error in the figures on the caisson alternate. He immediately telephoned Captain Gilman, told him of the mistake and asked that the contract be awarded on the basis of the spread concrete footings, so that the caisson alternate would not be used. He asked for a conference with Gilman and he and his lawyer, Krohn went to West Point and had such a conference the next day, March 19. On that day, Gilman received instructions from the Quartermaster General's office to award the contract to plaintiff. That office was, presumably, not aware of plaintiff's claim of mistake.

At the March 19 conference Rappoli and Krohn raised the question of whether the defendant had the right to consider plaintiff's telegraphic modification of its bid since it arrived after the hour set for opening. Gilman said that because plaintiff's first bid was already lower than any other bid, and thus no other bidder was prejudiced, the defendant could consider plaintiff's still lower telegraphic bid though it arrived late. He also said that caissons would be used, rather than spread footings. As to the mistake he said that the disparity in the bids made it obvious that a mistake had been made, but that proof would have to be submitted to the proper authorities. He arranged for a

conference at the Quartermaster General's office in Washington for March 24.

The next day, March 20, Gilman wrote Rappoli citing, as shown in finding 11, a decision of the Acting Comptroller General to the effect that a conclusive showing of mistake must be made, to secure a correction after the opening of bids. Rappoli and his lawyer Rosenvinge went to Washington for the March 24 conference at the office of the Quartermaster General. That official was represented by Colonel Pitz, the contracting officer. Captain Gilman and other officials of the Department were present. The two questions raised by plaintiff with Captain Gilman at West Point on March 19 were again raised. Colonel Pitz said, as to the first, that the Department had a right to consider plaintiff's late bid because its earlier bid was lower than any other. As to the question of the mistake in the bid on the caisson alternate, he said the Department had no desire to take advantage of a contractor's mistake; that the mistake could be corrected if plaintiff would submit its proof through proper channels.

During the conference Captain Gilman handed Rappoli an envelope containing the award of the contract on the basis of the telegraphic bids. Rosenvinge, for Rappoli, objected, because the mistake had not been corrected. Both parties were anxious to proceed with the contract without delay, in order to be safe against an expected increase in costs. Plaintiff's representatives then agreed to accept the award, but made it plain that they expected the mistake to be corrected, and Colonel Pitz expressed no disagreement to this.

Plaintiff had its proof there at the time, and with the instruction of officials then present, a letter was addressed to Captain Gilman setting forth the circumstances of the mistake and attaching the evidence. Captain Gilman was already convinced that a mistake had been made, and Colonel Pitz indicated no doubt of that fact. Colonel Pitz had in mind that the question would go to the Comptroller General, with the Department's findings and recommendation, for decision, but he did not tell plaintiff's representatives that, and they had no idea how such matters were decided, and supposed that the Department decided them itself.

Captain Gilman transmitted plaintiff's letter and proofs to the Department with a recommendation that consideration be given to correcting the error. The Department, by a communication to the Comptroller General which is not in evidence, recommended that the error be corrected.

Captain Gilman on April 5 sent the contract to plaintiff for signature, accompanied by a copy of a radiogram showing that the Department had made this favorable recommendation to the Comptroller General. On April 6 the Comptroller General ruled that the mistake would not be corrected. On April 9, plaintiff not having been advised of that ruling, and expecting the mistake to be corrected, signed the contract and began to perform it. On April 22 Captain Gilman advised plaintiff of the Comptroller General's adverse ruling. From that time for some two years plaintiff attempted to get the matter reconsidered by the Comptroller General. Most of that time had expired before plaintiff was able to convince the Comptroller General of the fact that the mistake had been called to the attention of the Government before the award of the contract was made. But even then the decision was the same, though the reason was different.

The foregoing story began with a careless, but understandable mistake on the part of plaintiff. The mistake was apparent in six minutes to the first official of the Government who had anything to do with the transaction. Almost six years have now elapsed and the mistake is still uncorrected. Within two days after the mistake was made, and while the circumstances were such that the Government would not have been prejudiced to the amount of a penny, plaintiff asked that the mistake be corrected. Plaintiff was given an interview with a formidable group of officers and heard fair words from the officer entrusted by the Government to make the contract. It was told that the Department had no desire to take advantage of mistakes; that the mistake could be corrected by going through a routine; that the Government desired that the contract be made in the regular way so that the work could proceed promptly; that when the routine was finished plaintiff would receive what it was entitled to.

Plaintiff, in natural reliance on these fair words, immediately started the routine. The mistake is still uncorrected. The Department which had invited plaintiff to deal with it, for some reason not divulged to us abdicated its responsibility of dealing fairly with plaintiff, and turned that responsibility over to another Government official, with "findings and a recommendation." The findings and recommendation were not put in evidence. Presumably the findings were cloudy and indefinite, for that other official did not become aware of what he regarded as one of the most important facts in the case until nearly two years after he had first decided it, although that fact was obvious to the officials of the Department who should have decided it. Plaintiff was advised that the recommendation was favorable, so presumably the findings were favorable to whatever extent they were intelligible. But we have not seen them.

Plaintiff asks us to reform the contract to make it conform to what it intended, and what the Government knew it intended, when the contract was made. The equity of plaintiff's claim is obvious. The defendant here asserts that no mistake has been proved. We disagree. The fact that a mistake had been made was obvious to Captain Gilman when he looked at the bids. The fact of how the mistake had occurred was never denied by the responsible Department, and it recommended its correction.

The defendant contends that, admitting the mistake, it cannot be corrected because of the parol evidence rule. It says that it can, being fully aware that a contractor with whom it is dealing has made a mistake in his computation, persuade him by fair words and promises that the mistake will be corrected according to the Government's routine, and thus induce him to sign the contract embodying the mistake, and then turn upon him and say, now you have signed it and you are caught.

Of course no single official of the Government has done all these things to this plaintiff. But if all the actions of all the officials involved had been taken by one person, they would have added up to what we have said. And they would have fallen well below required standards of fair dealing.

We have recently said that an entity such as a Government, which acts through many agents, must so coordinate the activities of its agents that the sum of their actions is up to the standard of fair dealing that is required of common men. *Struck Construction Co.* v. *United States*, decided May 4, 1942. (96 C. Cls. 186.)

We think that the parol evidence rule does not prevent a court from enforcing a promise made, concurrently with the execution of a contract, to correct a mistake in that contract, it being to the convenience of the parties that the contract, without the correction, be executed at the moment while time is taken to correct the mistake.

If the promise of Colonel Pitz, the Government's contracting officer, that the mistake would be corrected, was not unconditional, what condition might have been intended? The most probable one is that plaintiff should put its claim and proof of mistake through "regular channels". This plaintiff did, so that condition was satisfied. Was there an implied condition that plaintiff's proof should be convincing to the officials of the Department with which plaintiff was dealing? It was convincing, as shown by the Department's recommendation. Was there a condition that plaintiff's proof should be convincing to another official of the Government with whom plaintiff was not dealing? Such an unexpected condition could not be spelled out from silence, or from such words as "regular channels". And if it could be spelled out, it would assume that that other official to whom the power of decision was committed would be given an intelligible statement of the facts by the Department which knew the facts, and would make a correct decision as to the law applicable to the true facts.

We think Colonel Pitz's promise as understood by plaintiff was that the mistake would be corrected, if it was put through the routine of the Department and if there was no legal impediment to its correction. That was its reasonable meaning and legal effect. It was put through the routine, and there was no legal impediment to its correction. The Department could have corrected it itself and should have done so. It is now before us and we will do so.

Syllabus

Plaintiff may recover $22,000.

It is so ordered.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, took no part in the decision of this case.

W. H. ARMSTRONG AND COMPANY (A CORPORATION) v. THE UNITED STATES

[No. 44583, Decided March 1, 1943]

On the Proofs

Government contract; oral change order; defendant's action not a breach of contract; modification of contract; performance and acceptance.—Where plaintiff entered into a contract with the Government to build officers' quarters at Bolling Field, D. C.; and where under said contract plaintiff was to furnish all labor and material to complete the job except common bricks, which were to be furnished by the defendant; and where plaintiff, before submitting its bid, inspected the stock pile of common brick from which defendant proposed to furnish the bricks to be used on the job, and upon the basis of such inspection made its estimates as to the amount of labor and mortar to be used in laying such bricks under the contract; and where before the laying of bricks was completed defendant's agents orally directed plaintiff to discontinue the use of bricks from said stock pile and to use bricks salvaged from a dismantled steel plant, which salvaged bricks were irregular in size and shape, many of them being fire bricks, larger than common bricks, entailing the use of more mortar and labor at an increased cost to plaintiff and its subcontractor, but with resulting savings to defendant; it is *held* that plaintiff is entitled to recover.

Same; defendant's action not a breach of contract.—The defendant's action in ordering the plaintiff to discontinue the use of the bricks from the stock pile and to use the brick salvaged from the dismantled plant did not constitute a breach of the contract by defendant and plaintiff is not entitled to recover as for compensation for loss caused by breach of contract.

Same; modification of contract in accordance with its terms.—The direction by the Government's representative to plaintiff as to the change in the bricks to be used, except for the form in which it was given, was a modification of the contract which the defendant had the power to make under the terms of the contract, either as an order for extra work or material within the provisions of Article 5 of the contract and Section 27 of the specifications, or a change order under Article 3 of the contract.

Same; application of least burdensome provision.—Where one party writes a contract in its own language, as the Government did in the instant case, and inserts in it two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one rather than the other of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him.

Same.—The order of the Government's representative to use the salvaged bricks was, in effect, an order to use whatever extra labor and extra mortar it would take to make walls out of such bricks, and the provisions of Article 5 of the contract were applicable.

Same; approval.—The approval, written or otherwise, of the order for extra materials and labor by the head of department was not necessary to the validity of the order, under the provisions of Article 5 of the contract.

Same; full performance; acceptance.—If the transaction involved in the instant case had remained unperformed, it would probably have been, because it was oral, unenforceable, by reason of the requirements of Article 5; but the buildings were constructed of the materials and with the labor orally ordered; there was not only part performance, but full performance, constituting concrete evidence of what the order was, and this was not denied by the Government, which accepted the work as performed under the oral change order and benefited thereby. *United States* v. *Andrews*, 41 C. Cls. 48, affirmed 207 U. S. 229, 245, cited. See *St. Louis Hay and Grain Co.* v. *United States*, 37 C. Cls. 281, affirmed 191 U. S. 159, 163; *Douglas Aircraft Company, Inc.* v. *United States*, 95 C. Cls. 140.

Same; contract effectuated.—Where the contracting officer orally directed plaintiff to use the salvaged bricks and promised that an adjustment would be made when the work was completed and when the fair amount of extra compensation was determined; and where that direction was performed by plaintiff by doing the work and using the required material; it is *held* that there resulted a contract to pay plaintiff the reasonable cost of the extra labor and materials. *Griffiths* v. *United States*, 77 C. Cls. 542 cited. *Plumley* v. *United States*, 43 C. Cls. 266, 45 C. Cls. 185, affirmed in part, 226 U. S. 545, not followed.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* was on the briefs.

Mr. J. M. Friedman, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Brice Toole* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and, at all times herein material, had its principal office and place of business at Fairmont, West Virginia.

2. On August 27, 1932, plaintiff and the defendant, represented by its contracting officer, P. W. Guiney, Colonel, Q. M. C., acting chief, Construction Division, entered into a contract whereby plaintiff agreed to furnish all labor and materials and perform all work required for the construction and completion of two field officers' quarters and eleven company officers' quarters at Bolling Field, D. C., and in consideration thereof, the defendant agreed to pay plaintiff the sum of $142,046.00. Labor and material were required to be furnished in strict accordance with specifications, schedules, and drawings which were made a part of the contract. The walls of the buildings were to be of brick. Outside exposed surfaces of the walls were to be of facing bricks, and the basement walls and the inside portion of the walls behind the facing bricks were to be of common bricks.

The contract and specifications are in evidence and are made a part of these findings by reference.

3. Articles 37 and 38 of the specifications, insofar as here material, provided as follows:

> 37. *Scope of Work.*—The work under this heading [brick work] consists of furnishing all material (except common brick furnished by U. S.) and equipment and performing all necessary labor to do all brick work shown on the drawings or specified.
>
> 38. *Material.*—Material for work under this heading [brick work] shall conform to the following specifications:
>
> "*Brick, Common* will be furnished by the U. S. at the location indicated by the C. Q. M."

The specifications provided that the abbreviation C. Q. M., used therein, should stand for Constructing Quartermaster.

4. Common bricks as recognized in the industry are red shale bricks approximately 2¼ inches in thickness, 3¾ inches in width and 8 inches in length, although they may vary in length from 7⅞ to 8¼ inches and in thickness from 2¼

to $2\frac{3}{8}$ inches due to the fact that some of the bricks when burned in the kiln are nearer the fire than others and, therefore, shrink more. All such bricks are cut the same size before baking.

5. Before plaintiff bid for the contract, its representatives visited the Constructing Quartermaster at Bolling Field, who was to be in charge of the work, and requested that they be shown the common bricks which the defendant would furnish in accordance with the provisions of Article 38 of the specifications. They were shown a large pile containing between a million and a million and a half common bricks, which pile became known as the stock pile. Defendant's representative told them that these were the bricks which would be furnished for use under the contract. They were salvaged red shale common bricks and in excellent condition. Plaintiff's representatives took away with them average samples of these bricks. Plaintiff's bid was computed upon the assumption that common bricks were to be used.

6. Plaintiff began work under its contract on September 12, 1932. It used from the stock pile common bricks required for the work until about the middle of October 1932, when it was directed by defendant's representatives to cease the use of bricks from the stock pile. This order was given because the defendant wished to use these bricks for facing work under other contracts in progress on the site. Up to that time, plaintiff had used from the stock pile 210,820 common bricks.

7. Thereafter, defendant advertised for bids on a contract to clean bricks from a dismantled steel plant and haul them to the site of plaintiff's project, a distance of about a mile. Plaintiff was the successful bidder for this contract, which is made a part hereof by reference. The cleaning contract contained no reference to the intended use of these bricks, but at the time of taking the contract plaintiff understood they were to be used in the construction of the houses he was building under his principal contract. However, at the time of taking the contract, and on the basis of a cursory inspection, plaintiff believed that the steel plant bricks would be reasonably suitable for its purposes, and did not realize how irregular and defective they were.

Plaintiff was required by the defendant to use these bricks except for certain minor requirements of the work not herein involved. The majority of the bricks salvaged from the steel plant and which the plaintiff was required to use had been used in furnaces in the steel plant and were not common bricks, but fire bricks and bricks of varying sizes and shapes such as circle bricks, wedge bricks, arch bricks, oversized bricks, split bricks, and brickbats. Plaintiff was required by the defendant to use 386,500 of these varying types and sizes of bricks.

8. Fire bricks are considerably larger than common bricks, being 2½ inches in thickness, 4½ inches in width, and 9 inches in length. They are porous and absorb water from the mortar much more readily and quickly than common bricks.

9. Because plaintiff was required by the defendant to use fire bricks and odd-shaped bricks and brickbats, and because these types of bricks could not be laid uniformly behind the facing bricks, which are of the same size as common bricks, and because the walls were made thicker by the use of these bricks than required by the drawings, the amount of labor and mortar required to construct the walls was increased.

10. Plaintiff used in the construction of the buildings 900,935 bricks of all kinds, including those described in Finding 9 hereof. If common bricks of the type shown to plaintiff in the stock pile prior to the time plaintiff bid on the contract had been used instead of the bricks from the steel plant, 958,000 bricks of all types would have been used.

11. The total cost of mortar, exclusive of labor, used by plaintiff in completing the work under the contract was $4,331.66.

Had common bricks of the type shown to plaintiff in the stock pile, prior to the time plaintiff bid on the contract, been supplied by defendant, the cost of the mortar, exclusive of labor, necessary to lay the 958,000 common bricks which would have been required would have been $2,682.40. The excess cost was, therefore, $1,649.26.

12. Plaintiff entered into a subcontract under which it agreed to pay the subcontractor $11,400 for the labor of laying the bricks under plaintiff's contract. When the steel

plant bricks were furnished by the defendant, the subcontractor protested to plaintiff, and plaintiff agreed to pay him additional compensation. When the work under the principal contract was completed, plaintiff failed to pay the subcontractor such additional compensation, and the subcontractor brought suit against the plaintiff in a West Virginia court and obtained judgment against plaintiff for $3,954.40, plus interest. Plaintiff paid him $4,000 to settle the case.

13. A reasonable allowance for overhead and profit on any amount recoverable herein for labor and materials is 10 percent thereof for overhead, and 10 percent on the aggregate for profit.

14. Upon being required to use the steel plant bricks plaintiff protested orally to the Constructing Quartermaster. Plaintiff and the Constructing Quartermaster agreed that plaintiff would continue to use the steel plant bricks and would at a later date submit the extra cost involved to the Constructing Quartermaster for audit.

September 25, 1933, after the completion of the contract, plaintiff submitted to the then Constructing Quartermaster its claims for the cost of additional labor and material incurred by it in compliance with the order to use bricks that were not common bricks. These claims were rejected by this Constructing Quartermaster, who was the successor in office of the Constructing Quartermaster to whom the plaintiff had theretofore protested, and they have not been satisfied in whole or in part.

15. Plaintiff's contract contained the following provisions:

> ART. 3. *Changes.*—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in

> writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> Art. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.
>
> Art. 18. *Definitions.*— * * *
>
> (b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

In Section 27 of the general conditions of the specifications there was the following provision:

> No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.

C. Q. M. was defined in the specifications as meaning the Constructing Quartermaster.

The court decided that the plaintiff was entitled to recover.

Madden, *Judge*, delivered the opinion of the court:

Plaintiff contracted with the defendant to build some thirteen officers' quarters at Bolling Field in the District of Columbia for $142,046.00. Plaintiff was to furnish all labor and materials to complete the job, except common bricks, which were to be furnished by the defendant. According to the specifications, the basement walls were to be constructed of common bricks, and the walls above the basement were to have a facing of facing bricks backed with common bricks. Before plaintiff submitted its bid, its representatives visited the site and asked to see the common bricks which the defendant intended to furnish for the job. The defendant's Constructing Quartermaster, who was to be the defendant's representative in dealing with the contractor,

showed plaintiff's representatives a stock pile of more than a million salvaged common red shale bricks of good quality. Plaintiff took samples of these bricks and in computing the amount of its bid estimated the amount of labor and mortar to be used in laying the bricks under the contract on the assumption that common bricks such as were in the stock pile would be furnished.

Plaintiff subcontracted the labor of laying the bricks for $11,400. The bricklaying began September 12, 1932, and bricks from the stock pile were used for about a month. Then the defendant's agents directed plaintiff to use no more bricks from the stock pile, but to use bricks salvaged from a dismantled steel plant near the site and cleaned. Plaintiff asked for and obtained the contract to clean these bricks. The steel plant bricks were irregular in size and shape, many of them being fire bricks, which are considerably larger than common bricks, and are porous and absorb the water from the mortar and thus create difficulties in laying them. The larger size of the steel plant bricks made the walls thicker and thus required the use of more mortar.

Plaintiff's subcontractor protested to plaintiff at the change in the kinds of bricks, and plaintiff agreed to pay him extra compensation for his extra labor. Plaintiff protested orally to the defendant's representative, the Constructing Quartermaster, who entered into an oral agreement with plaintiff that plaintiff would continue to use the steel plant bricks and would later present its extra costs to the Constructing Quartermaster for audit.

September 25, 1933, after the completion of the contract, plaintiff submitted a claim to the then Constructing Quartermaster for its additional costs, but nothing has been paid plaintiff in that regard. Plaintiff's increased cost of mortar was $1,649.26, and plaintiff paid its bricklaying subcontractor $4,000.00 to settle a law suit brought against plaintiff by the subcontractor for the increased cost of laying the irregular bricks.

Plaintiff, no doubt for the purpose of by-passing obstacles in the shape of non-compliance with formal requirements of the contract, plants its case upon the theory that the defendant breached the contract as written, when it ordered the

use of the steel plant bricks, and thereby excused plaintiff from strict performance of the contract and laid itself liable to compensate plaintiff for the losses caused by its breach.

We think that plaintiff's theory is not supportable. We think that the Contracting Quartermaster's direction to plaintiff was, except for the form in which it was given, a modification which the defendant had the power to make, under the terms of the contract. It was either an order for extra work or material within the provisions of Article 5 of the contract and Section 27 of the specifications, or a change order under Article 3 of the contract, which provisions are quoted in finding 15. We are therefore obliged to determine whether the obstacles to recovery which plaintiff by its theory sought to avoid are insuperable, as the defendant urges.

We think that Article 5 of the contract is the applicable article. The Constructing Quartermaster's direction to use the steel plant bricks was, in effect, an order to use whatever extra labor and extra mortar it would take to make walls out of such bricks. So Article 5 fits the situation quite precisely. If neither Article 5 of the contract nor Section 27 of the specifications were present, Article 3 might be made to apply, but that is not necessary with these other provisions present.

When one party writes a contract in its own language, as the Government did here, and inserts in it two separate provisions, either of which might apply to a given state of facts, but different legal consequences would result if one, rather than the other, of the two provisions was applied, the other party to the contract is, in the absence of evidence of a contrary intent, entitled to have applied the provision which would be least burdensome to him.

The defendant urges that, even though Article 5 is the applicable article, and it contains no requirement of approval by the head of the department of an order for extra work or material, yet such a requirement should be read into Article 5 by implication. The defendant argues that the contract is not very rational unless these two articles are read as being consistent with each other. We are inclined to agree. But it was the defendant's writing, its standard

form of contract prepared with great care, used by it thousands of times, and we are not willing to read into it important provisions which are not there, in order to enable the defendant to escape from paying for what its officer ordered, and the defendant has received and is, presumably, now enjoying. We conclude therefore that under a proper interpretation of the contract, the order of the Constructing Quartermaster was given under Article 5 of the contract, and the approval of the head of the department, written or otherwise, was not necessary to the validity of the order.

We come now to the question whether the Constructing Quartermaster's failure to write his order for the extra work and materials prevents plaintiff from recovering for them.

It would have been impracticable for either plaintiff or the Government to have followed strictly the injunction of Article 5 in this case. The right price for the extra work and mortar could only have been guessed at when the order was first given. Ordinary prudence on the part of each would have required what was done here, viz, the deferment of consideration of the cost to a later time. Our observation of cases litigated here tells us that this kind of prudence is frequently practiced in such situations. If the Constructing Quartermaster had done here what was agreed to be done, and had given plaintiff a written order after the extra cost had been determined, the bill would quite certainly have been paid, though Article 5 would not have been strictly complied with. If the Constructing Quartermaster had, at the time he gave his order, said in writing what he said orally, that would not have been a compliance with Article 5, which requires that the "price (be) stated in such order." Strictly, plaintiff could not have protected itself against what has here happened to it except by refusing to obey the order and demanding that the Constructing Quartermaster do, in writing, what was impossible to do at all, viz, fix a price which could not prudently be fixed at that time. Perhaps that would have been correct practice.

Our question is, however, not what would have been correct practice when the extras were ordered, but what to do with a case in which the responsible representative of the

Government has not done nor has the contractor insisted upon his doing what the contract enjoined him to do at that time; a case in which, moreover, the contractor has, pursuant to an oral rather than a written order, performed just what the Government wanted to be done, and the Government has taken the product of that performance but refuses to pay for it. If we say that the position of the Government is legally correct, we thereby refuse to remedy a grave injustice because of the omission of a formality, because the words of the contracting officer were spoken and not written and did not say what was then impossible to say.

The law as it relates to persons other than governments has frequently encountered the same problem, and has usually succeeded in vindicating the purpose of the formal requirement, without at the same time leaving one man's money in another man's pocket. For example, the Statute of Frauds, setting up a formal requirement by statute, and not by mere contract, and threatening the unwritten transaction with such ominous consequences as that it should be "void," has not, in effect, been permitted to do more than to nullify unperformed agreements, leaving the parties, in general, where they would have been if the informal transaction had not occurred. Likewise the omission of a seal, if in fact there is a consideration paid, only demotes the deed to the position of a contract, fully enforceable in equity.

Even in the sphere of government dealings, the neglect to advertise for bids, though such advertisement was required by statute, has not been permitted to justify the Government in receiving property manufactured for it and using it without paying what it was reasonably worth.[1] Nor has the fact that a contract was not "reduced to writing and signed by the parties with their names at the end thereof" as required by Revised Statutes, Sec. 3744, been held to justify the Government in receiving the benefits of a contract informally made and refusing to pay for them. *United States* v. *Andrews*, 207 U. S. 229, 243; see *St. Louis Hay and Grain Co.* v. *U. S.*, 191 U. S. 159, 163.

If the law has been able to accomplish so much justice, in the face of apparently forbidding statutes, without impair-

[1] See *Douglas Aircraft Company, Inc.*, v. *United States*, 95 C. Cls. 140.

ing the purpose and policy of the statutes, we think as much should and can be done with words in a Government contract, such as the words in Article 5 of the contract here in question. If the transaction had remained unperformed, it would probably have been, because it was oral, unenforceable. But in the instant case the building was built of the materials and with the labor orally ordered. There was not only part performance, but full performance, constituting concrete evidence of what the order was, which was, in addition, undenied by the Government. By any of the tests applied in the analogous situations with which the law has dealt, plaintiff is entitled to be paid.

There is not a word in the record to show that the order of the Constructing Quartermaster, by which he saved some hundreds of thousands of bricks of good quality and diverted them to a more economical use for the Government, was in fact given without consultation with and sanction of his superior officers in the department. There is no evidence that the department was not pleased at and benefited by the result accomplished by the order. There is no evidence that the Constructing Quartermaster was disciplined or even reprimanded for having, in violation of the mandate of the defendant's standard contract, ordered this extra work, the consequence of which was, unless we give relief, to cheat this plaintiff out of a large amount of money, and involve the department in an act of repudiation which, if done by anyone other than a government, would be regarded as dishonorable, even if legally permissible.

What we have said leads us to this conclusion: when the contracting officer orally directed plaintiff to use the steel plant bricks, and promised it that an adjustment would be made when the work was completed and the fair amount determined, and when that direction was performed by plaintiff by doing the work and using the required material, a contract to pay plaintiff the reasonable cost of the work resulted.

We recognize that the decision of the Supreme Court of the United States in *Plumley* v. *United States*, 226 U. S. 545, is contrary to what we have said. We see no distinction,

in principle, between that case and the cases of *United States* v. *Andrews* and *St. Louis Hay and Grain Co.* v. *United States*, discussed above. All the authorities in comparable legal situations are in accord with the latter cases, and we think it is our duty to follow this general trend of authority, which leads to what we regard as a just decision, rather than the *Plumley* case, which seems to stand alone. This court decided the case of *Griffiths* v. *United States*, 77 C. Cls. 542, as we decide this case, though it did not discuss the *Plumley* case.

Plaintiff is entitled to recover $6,835.61.

It is so ordered.

LITTLETON, *Judge*, concurs.

JONES, *Judge*, concurring:

I concur in the result, but on the ground that the defendant, in refusing to furnish and permit plaintiff to use the brick which it had agreed in writing to furnish, breached the contract as written and became liable for damages and excess costs directly flowing from such breach. I do not think either Article 3 or Article 5 is involved. If the point were reached where either of these articles could be invoked I think the *Plumley Case*, *supra*, would govern. However, in view of the outright breach of the contract by the defendant I do not believe that point has been reached.

WHALEY, *Chief Justice*, dissenting:

I cannot agree with the majority opinion.

Article 3 of the contract provides for orders of the contracting officer involving changes to be in writing and when the order for a change is over $500.00 the written approval of the head of the department shall be necessary. Article 5 of the contract provides that no charge for any extra work or material will be allowed unless the same had been ordered in writing by the contracting officer and the price stated in the order.

Dissenting Opinion by Chief Justice Whaley

Plaintiff claims a change was made involving thousands of dollars. No written order for the change was ever issued by the contracting officer and approved by the head of the department.

The substitution of firebrick for common brick was a change from one thing to the other, and I do not see how it can be said not to be a change. However, it required more of mortar to lay firebrick than common brick, and in that respect the change did involve an "extra."

But the "extra" clause of the standard contract is not exclusive; it does not have the effect of converting a change into an extra. If the thing done is a change, it is subject to the provisions covering changes.

The situation is made clearer perhaps by supposing the contract to have required the use of firebrick, for which thereafter common brick was substituted. Common brick requiring less work and material than firebrick, there would then admittedly be no "extra." The change from firebrick to common brick would have to be considered just that—a change. Being a change it would be subject to all the provisions in the contract relating to changes. As far as any practical concept of "change" is concerned, there is no difference between the passage from common brick to firebrick, and the passage from firebrick to common brick.

I can find no case in this court or the Supreme Court which gives even a semblance of sanction to the interpretation of Articles 3 and 5 of the contract which would justify their total avoidance.

Remedy is with the Congress and not the court.

I am of the opinion that the provisions of Articles 3 and 5 of the contract are equally binding on both parties, and plaintiff is not entitled to recover. *Ferris* v. *United States*, 28 C. Cls. 332; *Hawkins* v. *United States*, 96 U. S. 689, 697; *McLaughlin* v. *United States*, 36 C. Cls. 138; *Plumley* v. *United States*, 226 U. S. 545, 547; *United States* v. *John McShain, Inc.*, 308 U. S. 520, 521; *Dravo Corporation* v. *United States*, 94 C. Cls. 270, 280; *Reediger, Inc.* v. *United States*, 94 C. Cls. 120, and *Callahan-Walker* v. *United States*, decided by the Supreme Court November 9, 1942, 317 U. S. 56.

The cases of *United States* v. *Andrews*, 207 U. S. 229 and *St. Louis Hay and Grain Co.* v. *United States*, 191 U. S. 159, are distinguishable.

WHITAKER, *Judge*, concurs in this opinion.

IRA J. LYONS, TRADING UNDER THE NAME AND STYLE OF LYONS CONSTRUCTION COMPANY, v. THE UNITED STATES

[No. 45215. Decided March 1, 1943]

On the Proofs

Government contract; liquidated damages for delay; suit to recover; review of action of contracting officer in granting an extension of time.—Where the evidence shows the action of a contracting officer granting an extension of time was grossly erroneous, it will be set aside; where not shown to be grossly erroneous it is final and conclusive, and the Comptroller General was bound thereby and was without authority to assess liquidated damages for such period.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *Messrs. King & King* were on the briefs.

Mr. Milton Kramer, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows upon an agreed statement of facts:

1. The plaintiff, Ira J. Lyons, is a citizen of the United States and is engaged in the marine contracting business, operating and doing business under the name and style of Lyons Construction Company, with its principal place of business in the City of Grand Rapids, State of Michigan.

2. On March 25, 1933, the defendant invited proposals for the construction of the North Manitou Shoals Light Station, located on the northeasterly shore of Lake Michigan, about 30 miles north of Frankfort, Michigan.

Accompanying said invitation for proposals were the specifications for the proposed Light Station. Included

in the said specifications was paragraph 5 of the General Clauses, which provided as follows:

> Work shall be commenced within 10 calendar days after advice of final approval of contract and notice to proceed with the work, and shall be completed in not to exceed 120 calendar days from date of notice to proceed.
>
> Bidders will state on Bid, Time, Calendar Days, required for completion of work, after notice is given to proceed.
>
> In executing the work the crib should be sunk not later than about June 1st in order to accomplish the submarine portion of the work during the most favorable weather, and in order to complete the entire project within the 120 days specified.

3. Bids were submitted by various contractors in response to defendant's invitation for proposals, but because of the enactment of the Act of March 20, 1933, 48 Stat. 8, defendant did not accept any of the bids, nor make any award of the contract for the construction of the proposed Manitou Shoals Light Station.

4. On July 18, 1933, the defendant again invited proposals for the construction of the said Manitou Shoals Light Station. The plaintiff's bid for the proposed work was the lowest received and, accordingly, on July 21, 1933 it entered into a contract with the defendant, represented by N. M. Works, First Assistant Superintendent, Lighthouse Service, Department of Commerce, under the terms of which plaintiff agreed to furnish all labor and materials and perform all work required in the construction of North Manitou Shoals Light Station, located on the northeasterly shore of Lake Michigan, about 30 miles north of Frankfort, Michigan, for the consideration of $69,950.68.

5. The specifications for the proposed Light Station contained paragraph 5 of the General Clauses, which was identical to paragraph 5 of the General Clauses of the specifications accompanying defendant's invitation for proposals dated March 25, 1933, quoted in finding 2 hereof.

6. Under the terms of said contract, plaintiff was to commence work within 10 days after receipt of notice to proceed,

and was to complete the work within 120 days after that date. In the event the contractor failed to complete the work within the time specified, liquidated damages were to be assessed at the rate of one-tenth of one per cent of the contract price plus $3.00 for each day of delay, but not to exceed $75 per day, except that no liquidated damages were to be assessed for the period from October 1 to April 30, inclusive, of any year.

The said contract further provided in part as follows:

> Article 9. *Delays—Damages.*—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted, the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually

severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

7. Plaintiff received notice to proceed with the work on July 29, 1933, which accordingly established June 26, 1934 as the completion date, no work under the contract being required during the period from October 1 to April 30 of any year.

On May 8, 1934, plaintiff requested that due to bad weather conditions the commencement of the 1934 working season be delayed until June 1, 1934. This request was granted in the form of a stop order issued by defendant on May 10, 1934. As a result the contract time was extended until July 27, 1934.

8. Upon receipt of his notice to proceed, plaintiff promptly and diligently commenced performance thereof. However, at various times during the performances of the contract work plaintiff experienced delays. As a result of the said delays the contract work was not completed until September 19, 1934, or 54 days after the date fixed by the contract, as amended, for completion. The extent of the delays and the reasons therefor are set forth in the report of the contracting officer dated January 24, 1935, and the report of the Commissioner of Lighthouses dated April 8, 1935, approved by the Assistant Secretary of Commerce on June 6, 1935.

9. After the completion of the contract work, plaintiff submitted, through the contracting officer, a voucher for final payment, attached to which was a claim for the remission of liquidated damages. The contracting officer on January 24, 1935, forwarded the claim to the Bureau of Lighthouses with his findings, which findings read as follows:

JANUARY 24, 1935.

To accompany 12th Dist. Vou. 34114, LYONS CONSTRUCTION COMPANY.

P. O. 23593 Cont. C12a–3181

Causes and extents of delays considered excusable

Delay dates	Amount of delay	Reason	Reference
1933	*Days*		
Sept. 10, 11, 12	3	Failure of Govt. to deliver sewer drain pipes, etc.	Contr. letter 9–16–33.
Sept. 14, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, 30.	12	Extraordinarily bad weather, wind and sea conditions.	Cont. letter 10–2–33.
Period, Sept. 19 to 30, incl.	5	Unusual and extremely hard driving experienced.	Do.
October and November.	43	Extraordinarily bad weather, wind and sea conditions—37 days; unusual and extremely hard driving—6 days.	Contr. letters, Nov. 3 and 23, 1933; and Dec. 1, 1933.
1934			
June 1–15, incl.	15	Unforeseeable boiler repairs and repair of damage caused by ice.	Contr. letters, 6–18–34 and 6–30–34.
June 15, 16, 18, 21, 22, 25, and 26.	7		
Total	85		

Note 1. Actual delay in completion of contract: 53 days. See Statement of Contract Time attached.

Note 2. See attached memorandum signed by Asst. Supt. Works, Jan. 24, 1935, regarding extension of time during months of October and November 1933.

(s) N. H. WORKS,
Asst. Superintendent.

STATEMENT OF CONTRACT TIME to accompany 12th District Voucher No. 34114 in favor of LYONS CONSTRUCTION COMPANY.

Contr. 23593 C12a–3181

Contract is dated July 21, 1933. Per telegraphic authority granted by Bureau of Lighthouses, July 29, 1933, Lyons Construction Company was notified by District letter of same date, that proposal was accepted, effective July 31, 1933.

The contract time was 120 calendar days (excluding period, October 1, 1933, to May 1, 1934). District letter of May 10, 1934, to contractor exempted month of May 1934 from contract time.

In accordance with contract and with District letter of May 10, 1934, work should have been completed on or before July 28, 1934.

Work was completed on September 19, 1934—a delay of 53 days.

The contractor, in letters to this office, dated Sept. 16, Oct. 2, Nov. 3, Nov. 23, and Dec. 1, 1933, and May 8, June 1, June 18, June 30, and Oct. 8, 1934, all of which accompany Vou. 34114, gave notification of the causes of delay.

I have made a thorough study of the facts stated in contractor's letters and of the extent of the delay. It is my belief that the delay was not due to any fault or negligence on the part of the contractor, and I recommend that no assessment of liquidated damages be made against the Lyons Construction Company and that the bill of $3,930.32 be paid in full.

(s) N. H. WORKS,
Asst. Superintendent.

10. The Commissioner of Lighthouses made further investigation of plaintiff's claim and on April 8, 1935 forwarded it to the Secretary of Commerce with his findings, together with a recommendation that no liquidated damages be assessed against the plaintiff. Paragraphs 5 and 6 of his findings read as follows:

5. Under date of October 2, 1933, the contractor contends that 17 days were lost during September, 12 days being due to unusual severe weather, high wind, and heavy seas, and 5 days due to unforeseeable causes which could not have been anticipated in placing the steel sheet piling, due to the hard sand bottom of the lake, it being possible to drive but 51 of the steel sheet piles out of a total of 183 required in order to enclose the crib by the close of September. The Bureau is of the opinion that the substantiating weather records indicate unusual severe weather on September 14th, 16th, 17th, 18th, 19th, 20th, 21st, 25th, 26th, 27th, 28th, and 30th, 1933, and justify a corresponding extension of contract time, and so finds the fact. No apparent justification appears for the claim for 5 days additional time due to alleged difficulty in placing the steel sheet piles.

6. By letters of November 3d, November 23d, and December 1st, 1933, the contractor contends that due to the fact that it was necessary to continued operations through October and until November 18th, 1933, in order to make the crib safe for the Winter and comply with the plans and specifications, 43 days were lost during

this time, 37 days being due to weather, wind, and sea conditions, and 6 days due to encountering hard driving of the steel sheet piling. The Bureau is of the opinion that on account of the fact the months of October and November were exempt from inclusion in the contract time and from the assessment of liquidated damages, there is no justifiable basis under the terms of the contract for considering the alleged delays during these two months. As matters of fact concerning the execution of this contract, however, the Bureau states that due to the lateness in season in awarding this work, the site being located at a remote point on the Great Lakes, and the necessity of prosecuting the work in the open lake from floating equipment alongside the crib, and the further fact that the proposal for this project was originally advertised earlier in the year, or on March 25th, 1933, in order that award could be made for starting of work at the earliest possible date, not later than June 1, 1933 (see par. 5, page 7 of proposal), but deferred by the general stop order on all Governmental work at that time thereby preventing the award and necessitating readvertising the work in July 1933, the award as stated eventually being made effective from July 31, 1933, leaving little time for the contractor to accomplish the required work of enclosing the crib by the close of September 1933, the contractor's plan of operations was materially upset, no doubt resulting in delay in the final completion, and the Bureau finds that the contractor was delayed not less than 17 days for these reasons. However, reference is made to telegraphic instructions to bidders dated July 20th, 1933, also to Superintendent's letter of July 29, 1933, to contractor that Government assumes no responsibility for risks due to lateness of season in commencing work.

In all other respects the finding of the contracting officer was approved, except that in computing the extent of the delay due to the boiler repairs the Commissioner of Lighthouses computed it at 14 days instead of 15 days as computed by the contracting officer.

On June 6, 1935, the Assistant Secretary of Commerce approved the recommendation of the Commissioner of Lighthouses, and forwarded the voucher, plaintiff's claim, and all accompanying papers to the Comptroller General for settlement.

11. The Comptroller General on March 2, 1936, deducted from the final voucher the sum of $2,373.02, representing

liquidated damages for 32 days' delay in the completion of the contract. A copy of the Comptroller General's findings and decision on plaintiff's claim reads in part as follows:

> Of the total amount claimed, the sum of $2,373.02 is disallowed for the reasons hereinafter stated. The contract provided that the work should be commenced within 10 days after date of notice to proceed, and should be completed within 120 calendar days after that date, with the exception of the period October 1, 1933, to April 30, 1934, which was exempted from the assessment of liquidated damages. The contract also provided for the assessment of liquidated damages at the rate of one-tenth of one per cent of the contract price plus three dollars for each day's delay beyond the time specified for completion, but not to exceed $75 per day. The record shows that the notice to proceed was dated July 29, 1933, which accordingly established the completion date as June 26, 1934. By a stop order issued in connection with the contract, and dated May 10, 1934, the date for completion was extended 31 days (embracing the entire month of May), thus establishing the final completion date as July 27, 1934. The contract was actually completed on September 19, 1934, after a delay of 54 days beyond the time stipulated in the contract as extended by the said stop order, for which liquidated damages were deducted in the amount of $3,930.32, but which should have been deducted in the amount of $4,004.48. The contractor has requested that liquidated damages be remitted due to the alleged delay of: (1) three days, September 10, 11, 12, 1933, caused by the failure of the Government to deliver sewer, drain pipe, etc., (2) 49 days caused by alleged extraordinarily bad weather, wind and sea conditions,—September 14, 16, 17, 18, 19, 20, 21, 25, 26, 27, 28, and 30, 1933, and during certain days in October and November 1933, (3) 11 days, 5 of which were during the period September 19 to 30, 1933, inclusive, and 6 of which were during the month of October 1933, all caused by alleged unusual and extremely hard driving, (4) 15 days, June 1 to 15, 1934, inclusive, caused by boiler repairs, and (5) 7 days, June 15, 16, 18, 21, 22, 25, and 26, 1934, due to repairs necessitated by damages caused by ice.
>
> With respect to the above items of delay it has been administratively established that the contractor was delayed 19 days due to unusual and severe weather conditions, seven of which were due to repairs of damage caused by such weather conditions, and three additional days by the failure of the Government to deliver sewer,

drain pipe, etc. Accordingly 22 days of delay (19 plus 3) are excusable under Article 9 of the contract as being due to unforeseeable causes beyond the control and without the fault or negligence of the contractor. All of the allowable days in items (2) and (3) above are either covered in the 19 days allowed for unusual and severe weather or by the letter of July 29, 1933, in which the contractor was notified that the Government assumed no responsibility for risks due to lateness of the season in commencing the work, and the above-mentioned contract provision exempting the period October first to April thirtieth from the assessment of liquidated damages. The delays occasioned by the boiler repairs were the sole responsibilty of the contractor, the contractor having himself demanded a premature inspection which found the repairs necessary. The contractor, therefore, is entitled to credit for only 22 days of the actual delay of 54 days in completing the contract and is chargeable with all delays in excess of 22 days. On this basis the contractor is chargeable with liquidated damages in the amount of $2,373.02. Since the amount of $3,930.32, originally assessed as liquidated damages, represented only 53 days instead of 54, the correct number of days, the contractor is entitled to a refund of only 21 days in the amount of $1,557.30.

The court decided that the plaintiff was entitled to recover.

Whitaker, *Judge*, delivered the opinion of the court:

This is a suit to recover liquidated damages assessed for failure to complete on time the work of constructing the North Manitou Shoals Light Station on Lake Michigan.

The contract was entered into July 21, 1933. Notice to proceed was received on July 29, 1933. Plaintiff was required to proceed within ten days thereafter and to complete the work in 120 days thereafter, excluding the period from October 1 to April 30, when no work was required to be performed. In addition, on account of bad weather a stop order was issued suspending work for the entire month of May 1934. This made the time for completion July 27, 1934. The work was completed September 19, 1934, 54 days later. Liquidated damages have been assessed for 32 days' delay amounting to $2,373.02, for which plaintiff sues.

The contracting officer found that the plaintiff had been delayed a total of 85 days, tabulated as set forth in finding 9, none of which he found was due to plaintiff's fault or negli-

gence. He recommended that no liquidated damages be assessed.

A copy of these findings was not furnished the plaintiff, but was sent to the Commissioner of Lighthouses. On review of the findings the Commissioner of Lighthouses disallowed the 5 days due to the unusual and extremely hard driving encountered from September 19 to 30, inclusive, and all of the delay during October and November, except 17 days. He also recommended that no liquidated damages be assessed. This was approved by the Assistant Secretary of Commerce.

Article 9 of the contract provides that "the contractor shall pay * * * liquidated damages for each calendar day of delay," but with the proviso that he shall not be "charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor * * *."

The contracting officer's findings are challenged by the defendant in the following three particulars: (1) 5 days delay from September 19 to 30 due to "unusual and extremely hard driving" conditions; (2) 43 days during October and November, as well as the allowance of 17 days during this period by the Commissioner of Lighthouses and the Assistant Secretary of Commerce; and (3) 15 days for "unforeseeable boiler repairs."

With reference to the first item, the defendant says this period of time is covered in part at least by the allowance for the same period on account of bad weather. This is true. The total period was 12 days. Eight days' allowance was made for bad weather during this time and, consequently, the allowance for hard driving during this period could not be for more than four days.

The defendant says in its brief that during this period the plaintiff "performed a substantial amount of work." No foundation for this statement can be found in the "Agreed Statement of Facts," upon which the case was tried. How much effective work was done is not stated expressly, but the contracting officer has found the plaintiff was delayed this length of time, and by inference at least he has found that it was unforeseeable that these conditions would be encountered, and there is nothing to contradict it.

The plaintiff is entitled to recover the liquidated damages deducted for these four days.

Plaintiff is not entitled to recover on account of any part of the 43 days' delay. No part of this period was included in computing the time for completion of the contract. Liquidated damages were not assessed for any part of this period. Plaintiff's costs were no doubt increased due to having to work at this time, but his suit is not for excess costs, but for liquidated damages deducted.

The last item is for "unforeseeable boiler repairs." Plaintiff's boilers had been approved until August 1934. Why he requested inspection in June is not disclosed, but there is nothing to contradict the contracting officer's finding that the condemnation of them was unforeseeable, and that this resulted in the delay stated.

The contracting officer found plaintiff was entitled to an extension of 85 days. Forty-four days were improperly allowed, but plaintiff is entitled to an extension of 41 days. He has been paid for damages deducted for 22 days. This leaves 19 days for which he is entitled to recover at $74.16 per day, a total of $1,409.04. Judgment will be rendered for this amount. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice;* concur.

JONES, *Judge*, took no part in the decision of this case.

ARNOLD M. DIAMOND v. THE UNITED STATES

[No. 45419. Decided March 1, 1943]

On the Proofs

Government contract; delay by Government; extra costs; liquidated damages; extension of time for completion.—Where plaintiff entered into a contract with the Government to install a turbo-generator and auxiliary equipment at the Norfolk Navy Yard; and where, by reason of the failure of the Government to deliver at the site the said turbo-generator within the time for completion as specified in the contract, plaintiff incurred extra costs for labor and other items; it is *held* that plaintiff is entitled to recover for extra costs incurred by reason of such delay. *United States v. Rice et al.*, 317 U. S. 61, distinguished.

Same; contractual obligations of Government.—The contractual obligations of the Government, except as they are made different by the terms of the contract, are no different from the obligations of parties, neither of which is a government.

Same; promise of Government.—The Government in effect promised plaintiff that when it gave him notice to proceed under the contract the machines which plaintiff was to install would be available so that he could proceed with reasonable economy to the performance of his contract, unless some circumstances arose without the Government's fault which prevented the machines from being available.

Same; United States v. Rice distinguished.—The opinion of the Court in the case of *United States* v. *Rice, et al.*, 317 U. S. 61, (96 C. Cls. 609) is not to be construed as meaning that the government, without any privilege reserved in the contract and without any consideration whatever for the damage caused to the contractor, can delay the performance of the contract as much as it pleases, and pay the bill for the damage merely by refraining from assessing liquidated damages against the contractor for his late completion.

The Reporter's statement of the case:

Mr. Frederic N. Towers for the plaintiff. *Mr. Norman B. Frost* was on the brief.

Mr. Brice Toole, with whom was *Mr. Assistant Attorney General Francis M. Shea* for the defendant. *Mr. Newell A. Clapp* was on the brief.

The court made special findings of fact as follows:

1. February 9, 1940, plaintiff entered into a contract with the defendant to furnish the materials, perform the work, provide necessary additional equipment, supporting structure, and piping necessary, and install a 6,000-KW turbo-alternator, condenser and auxiliary equipment in the Central Power Plant, Norfolk Navy Yard, Portsmouth, Virginia, for the consideration of $22,640.00.

The contracting officer for the United States was L. B. Combs, acting Chief of the Bureau of Yards & Docks, Navy Department.

The contract and specifications are plaintiff's Exhibit 1, which is made a part of this finding by reference.

2. The contract contained the following clause:

> The work shall be commenced within 5 calendar days after date of receipt of notice to proceed and shall be completed within 130 calendar days from the date of receipt of notice to proceed.

Article 5 of the contract provided:

> *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

March 6, 1940, plaintiff received from the defendant a notice to proceed with the work, and on March 11, 1940, plaintiff was informed by the defendant that completion of the work would be due by July 14, 1940.

3. After receipt of the notice to proceed, plaintiff visited the site of the work in order to contact Navy Yard officials to insure performance of the work in a manner that would least interfere with operations at the Navy Yard and in order also to schedule his operations.

Plaintiff conferred with Commander Fogg, U. S. N., Public Works Officer, who told plaintiff that Lieutenant Commander Wilson had complete charge of the contract and that plaintiff was to consult the latter officer with reference to all matters pertaining to the contract work. Plaintiff thereafter discussed the work with Commander Wilson and explained to him the methods intended to be employed and the prospects for speedy completion of the job.

4. The contract work involved installation of electric generating equipment consisting of a turbo-alternator and condenser. The turbo-alternator and condenser were to be furnished by the Government complete, under other contracts, except for piping as otherwise noted. The turbo-alternator was steam-driven and was designed to generate alternating electrical current. It was a heavy piece of machinery, weighing some 30 to 40 tons.

5. At the time plaintiff made his preliminary visit to Norfolk, he inquired of Commander Wilson as to when the turbo-alternator would be delivered and was informed that it was scheduled for delivery April 15, 1940. Plaintiff accordingly made plans to start his operations a week before that date so that when the machinery arrived all preliminary work would have been completed and actual installation could proceed immediately.

6. May 4, 1940, plaintiff advised Commander Fogg that necessary steel work had been ready to receive the turbo-

alternator since April 24, 1940, and stated that if the work were delayed beyond the contract time due to late delivery of the turbo-alternator an extension of time would be required. Commander Fogg thereupon advised plaintiff that plaintiff's claim would be given due consideration.

7. May 14, 1940, Commander Fogg notified plaintiff that the Bureau of Yards and Docks had authorized rewinding of the turbo-alternator and suggested that plaintiff stop work on the contract until the turbo-alternator was received.

May 27, 1940, plaintiff informed Commander Fogg that the suspension of activities involved certain extra costs. Commander Fogg informed plaintiff that he should submit detailed claim for extra costs, "keeping in mind the distinction between damages and costs." Thereafter plaintiff notified the Commander that he had no intention of filing any claim for damages but that he was relying upon the Navy to provide some small additional work to help defray the expenses of keeping his men on the job.

8. The turbo-alternator was received on the job on July 8, 1940, and its installation was completed by plaintiff on August 10, 1940.

9. As heretofore stated the turbo-alternator was scheduled for delivery on the site April 15, 1940. About a week before that date plaintiff's piping superintendent, Mr. Spindel, was sent from New York to the job in order to do the necessary preliminary work for the installation of the turbo-alternator and plaintiff himself arrived on the job two days before that date. Plaintiff had planned to take care of the installation of the turbo-alternator and plaintiff's piping superintendent was to take care of the pipe fitting work and the making of final connections so that both operations would proceed simultaneously. When plaintiff got on the job he found the turbo-alternator had not arrived. Plaintiff and his piping superintendent remained on the site of the job, being assured from time to time by Commander Wilson that the turbo-alternator was expected to arrive "almost any day." Plaintiff left the job about June 1, 1940, and did not return.

10. A few days before the turbo-alternator was delivered on July 8, 1940, plaintiff sent Mr. Kelvin, a superintendent in

his employ, down to the job from New York to take care of the installation, whereas, if the turbo-alternator had been delivered as originally scheduled plaintiff himself would have supervised that work. Mr. Spindel, the piping superintendent, was on the job from the date of his arrival one week before April 15, until the work was completed. The fore part of that time Spindel, with a limited crew, worked on preliminary work, and for two weeks in May he had other work referred to in finding 13. After that he remained on the job in order to guard equipment already installed and the tools plaintiff had on the site, which was necessary under the circumstances.

11. September 19, 1940, L. B. Combs, Assistant Chief of Bureau of Yards and Docks, contracting officer, wrote to plaintiff as follows:

> The work under Contract NOy–3882 was completed August 10, 1940, twenty-seven days after the date—July 14—by which performance was required.
>
> The steel structure that supports the turbo-alternator was erected by April 24. The turbo-alternator, furnished under another contract, was not, however, delivered until July 8, seventy-five days thereafter. The contracting officer finds that owing to this delay in the furnishing of the turbo-alternator—a delay unforeseeable on your part, beyond your control and without your fault or negligence—the progress of the work under your contract was retarded at the least 27 days, and, pursuant to Article 9 of the contract, hereby extends the time for completing the work 27 calendar days accordingly.

12. October 23, 1940, plaintiff submitted to Commander Fogg an itemized account of additional costs claimed to have been sustained by him chiefly as a result of the delay in the delivery of the turbo-alternator as follows:

Mr. Spindel—10 weeks at $100	$1,000.00
Mr. Kelvin—5 weeks at $80	400.00
Oil piping—Steam fitter and helper, 14 hrs. at $1.65	23.10
Welder, 8 hrs. at $2.00	16.00
Total labor	1,439.10
Comp. Insurance 6%	86.34
Overhead 10%	143.91
	1,669.35

Profit 10%	$166.94
	1,836.29
S. S. Unemployment 4% on labor	61.88
	1,898.17
Bond premium 1½%	28.90
	1,927.07

The extra labor costs were incurred in the amounts and for the reasons claimed. Some of the items other than labor costs were inaccurately computed in plaintiff's claim. Omitting the 10% for profit and recomputing the other items gives a total of $1,753.81.

13. The defendant's failure to deliver the turbo-alternator on the site as originally scheduled delayed the plaintiff 12 weeks in the completion of the work. About May 15, 1940, defendant gave plaintiff certain extra work which took two weeks' time, for which plaintiff was paid by defendant. This work had no connection with the principal contract, but it did reduce the additional time required for Mr. Spindel on the job from 12 weeks to 10 weeks. Because of the delay plaintiff was required to keep Spindel on the job 10 weeks longer and to place Mr. Kelvin on the job for 5 weeks—at salary and expenses of each as shown in finding 12.

Certain oil piping required to be furnished by the Government was defective. In order to make it usable for installation, plaintiff employed a steam fitter and helper, and a welder, for the time and pay as shown in finding 12.

14. December 18, 1940, plaintiff acknowledged receipt from defendant of $23,695.58, specifically excepting from the release thereupon executed the sum of $1,927.07 "for extra supervisory costs and changes to oil pipe," for the recovery of which amount this suit was filed.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the Court:

On February 9, 1940, plaintiff entered into a contract with the defendant to install a large turbo-alternator, condenser, and auxiliary equipment at the Norfolk Navy Yard, Portsmouth, Virginia, for $22,640. The machines to be installed

were, according to plaintiff's contract, to be furnished by the Government "under other contracts." They were in fact bought from a manufacturer, but whether they were made to order or ready made by that manufacturer, we do not know.

As shown in our findings of fact, plaintiff was notified on March 6, 1940, to proceed with the work. That fixed the completion date at July 14. Plaintiff went to Norfolk and made plans for his work. He was told that the turbo-alternator was scheduled for delivery April 15. He started his work a week before that date so as to be ready to install that machine when it arrived. On May 4 plaintiff advised the defendant's representative that he had been ready for some time for the turbo-alternator and that if by reason of late delivery he could not complete the work he would need an extension of time. May 14 the defendant's representative advised plaintiff that the Bureau of Yards and Docks "had authorized rewinding" of the machine and suggested that plaintiff stop work on the contract until the machine arrived. Plaintiff was, however, assured from time to time that the machine was expected to arrive "almost any day" and he remained on the job until about June 1, and thereafter left his piping superintendent, Spindel, on the job to care for plaintiff's equipment, and for the preparatory work which had already been done.

The turbo-alternator arrived on July 8. Plaintiff then sent a Mr. Kelvin who superintended the installation of the turbo-alternator, while Spindel had charge of the piping work. The job was completed by August 10. Plaintiff claims that ten weeks of Spindel's time was wasted, and that Kelvin's five weeks on the job would have been unnecessary had it not been for the delay, as plaintiff would, himself, have installed the machine while he was there in April and May.

The defendant offers no explanation for the delay. There is the statement in Commander Fogg's notice to plaintiff of May 14 that the Bureau "had authorized the rewinding" of the turbo-alternator. Whether this was because it was defectively manufactured, whether the manufacturer thereby became liable to the Government for the damages caused by the delay in delivering it, or whether, on the other

hand, the Government had changed its mind about how it wanted the machine wound, and had reserved, in its contract with the manufacturer the privilege, with or without penalty, to so change its mind, we do not know. We do not know whether the machine was manufactured on specifications written by the Government, which were so badly written that the product would have been unusable and therefore had to be rewound.

The Government, by providing in the contract that plaintiff's time of performance should run from five days after plaintiff was given notice to proceed, probably did reserve to itself considerable leeway as to when it should give that notice and when, therefore, plaintiff could count on beginning his work. But the notice to proceed was given on March 6, 1940, and the time for the beginning of plaintiff's performance was then definitely fixed. The evidence does not show what reason Commander Fogg, who gave the notice to proceed, had for believing that the machine would be available for installation shortly after the time set in the notice. If he did not take the trouble to ascertain the latest news on that question, he was not considerate of the useless expense that plaintiff might be put to if the machine should not be available.

Our question is whether the Government, in effect, promised plaintiff that when it gave him notice to proceed, the machines which he was to install would be available so that he could proceed with reasonable economy to the performance of his contract, unless some circumstance arose without the Government's fault which prevented the machines from being available. We think that would be the meaning of such a contract between parties, neither of which was a government, and we do not think that the obligations of the Government are different, except as they are made different by the terms of the contract. Here the Government, as we have said, offers no explanation of the delay which damaged plaintiff. We think, therefore, that unless by some provision of the contract it reserved to itself the privilege of delaying plaintiff to his damage, it breached its contract by doing so.

The Government seems to claim some right under Article 13 of the contract. That article is as follows:

> ARTICLE 13. *Other contracts.*—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

We do not think that that Article has anything to do with the instant case. It was in the contract because it is printed in the standard form of Government contract, and it is in that form because it is frequently applicable to the facts of Government contract situations, as where one contract is let for the construction of a building and another for the installation of plumbing and heating facilities, or the grading of the ground or the making of roads. Here no "other contracts for additional work" were let, with which plaintiff could cooperate, or with the performance of which he might interfere. We do not think that the fact that the Government was buying from a manufacturer, either ready made or made to order, the machine which plaintiff contracted to install, meant that plaintiff must accommodate himself to the performance of the seller of the machine by waiting around indefinitely for it to be delivered.

Article 13, like all the language of plaintiff's contract, was written by the Government, and if it was intended to have the meaning the Government seeks to give it, that meaning could easily have been put into words.

Article 3 of the contract, relating to changes, seems to us to have no application to our problem. No change in what plaintiff was to do under his contract was ordered. He was delayed because the machine which he had contracted to install was not furnished for installation for some months after the time when the Government, by necessary implication, agreed to furnish it.

We do not read the case of *United States* v. *Rice, et al.*, 317

U. S. 61, decided November 9, 1942, as meaning that the Government can, without any privilege reserved in the contract and without any consideration whatever for the damage caused to the contractor, delay the performance of the contract as much as it pleases, and pay the bill for the damage merely by refraining from assessing liquidated damages against the contractor for his late completion. If the Government should expressly reserve such an unreasonable privilege in its contracts it would pay heavily for the privilege in the increased amounts of bids which prudent contractors would submit. We see no reason why the Government should want such a privilege, or should be willing to pay for it. And we see no reason why it should get such a privilege without reserving it or paying for it, as we think it did not do in this case.

In the *Rice case*, *supra*, because of unforeseen soil conditions, it was impossible to build the building into which the plumbing contractor, the plaintiff in that case, was to install his plumbing, and the building had to be redesigned and relocated with consequent delay. There was nothing inconsiderate or unreasonable about the Government's conduct in that case, which contributed to the delay, or which would have amounted to a breach of contract even as between ordinary persons.

The item of $39.10, which is included in the judgment, was for the repair of some defective pipes furnished by the Government. The work was necessary, and the Government concedes the validity of the claim and makes no defense under Article 5 of the contract, relating to the formalities to be observed in the ordering of extra work.

Plaintiff may recover $1,753.81.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

WHALEY, *Chief Justice*, dissenting:

I do not agree with the majority opinion of the court.

Plaintiff knew when he entered into this contract that the turbo-alternator and other equipment were under construction at the time. There was a delay in the delivery of the

turbo-alternator, and plaintiff claims the cost of delay in delivery to the site of the turbo-alternator (heavy-duty alternating current generator) which was his duty to install under the contract.

Plaintiff's work was a "follow-up" job insofar as the installation of the generator was concerned. The manufacturer was late in its delivery due to some necessary changes in wiring, which of course took time in a generator of the size here involved, weighing some 30 or 40 tons.

Plaintiff had 130 calendar days in which to complete the installation, but could not complete within that time due to the fact that the defendant did not have the turbo-alternator at the Navy Yard in proper time for such completion. The plaintiff sues for the cost to him of the delay.

But the contract is a standard form of Government contract, with the usual clause respecting delays chargeable, among other things, to "acts of the Government," and with the clause giving the Government the right to make changes.

This case is on all fours with the case of *United States* v. *Rice, et al.*, decided by the Supreme Court November 9, 1942, 317 U. S. 61, in which the court said:

> Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work.

Here it is manifest that until the turbo-alternator has been delivered, there could be no installation. The specifications indicate that the turbo-alternator was to be delivered to this plaintiff, furnished by another contractor. Plaintiff could not proceed with the installation until it had been delivered.

The plaintiff was entitled to an extension of time for performance, and the extension was granted. To more than this, plaintiff is not entitled under his contract. *United States.* v. *Rice, et al., supra.*

Plaintiff also claims for two items amounting to $39.10, exclusive of overhead and profit, for extra work. Article 5 of the contract stipulates that there shall be no charge for extra work unless ordered in writing at a stated price. There was no order for this work under the contract and no recovery can be had.

I think the petition should be dismissed.

CHARLES SELTZER v. THE UNITED STATES

[No. 45709. Decided March 1, 1943]

On Defendant's Demurrer

Army officer discharged by order of the Secretary of War on direction of the President; power of President to establish Army regulations; power to discharge Army officer.—Where plaintiff, a major in the Reserve Corps of the Army on active duty, after a hearing before a lawfully constituted board of Army officers, which board recommended that he be reclassified, was notified by a letter signed by the Adjutant General that "by order of the Secretary of War" plaintiff was "by direction of the President honorably discharged"; it is *held* that such discharge was valid and plaintiff, accordingly, is not entitled to recover.

Same; recommendation of reclassification board not binding on higher authority.—Under the provisions of section 11 of the Army Regulations, the Adjutant General and the higher authorities are not bound to follow the recommendation of a reclassification board, "and may take such action as the circumstances of each case may require irrespective of the recommendation, provided such action is within the provisions of these regulations."

Same; fair hearing; good of the service.—It appears from the allegations of the petition that in the instant case plaintiff had a fair hearing and there is nothing to show that the recommendation of the reclassification board and the final action taken were dictated by any motive other than the good of the service.

Same; power of the Secretary of War to promulgate rules and regulations.—The President has power as Commander in Chief of the Army and Navy to establish rules and regulations for the government of the Army; and the Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through the Secretary must be treated as the acts of the President, and, as such, are binding upon all within the military establishment. *United States* v. *Eliason*, 16 Peters (U. S.) 295, 301. See also *Blake* v. *United States*, 103 U. S. 227, 231, 232; *In re Brodie*, 128 Fed. 668; *Davis* v. *Woodring*, 111 Fed. (2d) 523; *Myers* v. *United States*, 58 C. Cls. 199, affirmed, 272 U. S. 52, 117; *In re Smith*, 23 C. Cls. 452, 458, cited. *Runkle* v. *United States*, 122 U. S. 543, 557, distinguished.

Same; Congressional authorization.—If Congressional authority were necessary to enable the President to promulgate regulations for the Army such power is expressly granted by the Act of March 1, 1875; 18 Stat. 337.

Same; power of President to discharge Army officer.—Independent of the proceedings of the reclassification board, the President had inherent power to discharge plaintiff, but if he had not had such power it was expressly granted by section 37 of the Act of June 15, 1933, 48 Stat. 154, which provides that "any officer of the Officers' Reserve Corps may be discharged at any time in the discretion of the President."

Same; presumption that Secretary of War acts by authority of President.—The statement in the letter of discharge that the discharge of plaintiff was by "direction of the President" is presumptively correct. *Runkle* v. *United States*, 122 U. S. 543, 557, cited.

Same; power of President to delegate to Secretary of War power of discharge.—Plaintiff's discharge being an administrative matter, the President had power to delegate authority to the Secretary of War to discharge him. *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 334.

Mr. Charles Z. Seltzer, *pro se*. *Mr. J. H. Connaughton* was on the brief.

Mr. J. M. Friedman, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Elihu Schott* was on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This suit is before us on demurrer.

On April 23, 1942, plaintiff was a major in the Reserve Corps of the Army on active duty. On that day he received a telegram relieving him from active duty, and thereafter, on April 28, 1942, he received a letter from the Adjutant General of the Army honorably discharging him from his commission. He sues for two months' pay.

In his petition plaintiff alleges that his record as a reserve officer was good and that his discharge was a result of persecution by his superior officer, Col. Grant Layng. This officer, in accordance with "Tentative Army Regulations No. 605–230" relieved plaintiff from duty with his regiment and recommended that he be reclassified. This recommendation went through channels to Lieutenant General Krueger, the Commanding General of the Third Army at San Antonio,

Texas, who convened a board of officers to consider the recommendation. This board consisted of Brig. Gen. George H. Paine, Col. Alfred L. P. Sands, Col. Stanley F. Coar, Col. John Perkins, Lt. Col. Brooks C. Grant, and Maj. Roy R. Priest, the latter of whom was the recorder of the Board but had no vote.

This Board gave plaintiff due notice of the time and place it would meet to consider the recommendation, it gave him a list of the witnesses to be called, and notified him that the recorder would endeavor to obtain the attendance of any witnesses he desired.

Assuming the validity of the Army Regulations above referred to, the Board was lawfully convened, its proceedings were regular, and apparently the consideration given the matter was fair and impartial. The only complaint plaintiff makes of the proceedings is that opening and closing arguments were not permitted. This is without merit.

The Board found that plaintiff "does not possess the very high standard of leadership essential to command of troops," and recommended that "he be reassigned to duty involving administrative matters such as settlement of rents and claims, in which line he has demonstrated ability, or personnel classification, in which he has experience."

When the Board's recommendation reached the Adjutant General of the Army he did not reassign him but discharged him "by direction of the President." Authority for this action is found in section 11 of the Army Regulations referred to. This section reads:

> 11. *Action by convening and higher authority.*—a. The recommendation of a reclassification board becomes effective upon approval thereof by the convening authority, except that, in those cases in which the board recommends discharge, demotion, or removal from the active list of the Regular Army, and the convening authority approves or disapproves such recommendation, the complete record will be forwarded to The Adjutant General for final action. However, higher authority is not bound to follow the recommendation of the board and may take such action as the circumstances of each case may require irrespective of the recommendation, provided such action is within the provisions of these regulations.

Whether or not the initiation of the proceedings was inspired by Colonel Layng's dislike of plaintiff, it appears from the allegations of the petition that he has had a fair hearing and there is nothing to show that the recommendation of the Board and the final action taken was dictated by any motive other than the good of the military service.

But, plaintiff says the Army Regulations were invalid because promulgated by the Chief of Staff, "by order of the Secretary of War." He says under the Constitution only Congress has power "to make rules for the government and regulation of the land and naval forces."

There is no merit in this contention. One hundred years ago the Supreme Court said in *United States* v. *Eliason*, 16 Peters (U. S.) 295, 301:

> * * * The power of the executive to establish rules and regulations for the government of the army, is undoubted. The very appeal made by the defendant to the 14th section of the 67th article of the Army Regulations, is a recognition of this right. The power to establish implies, necessarily, the power to modify or repeal, or to create anew.
>
> The secretary of war is the regular constitutional organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulged through him must be received as the acts of the executive, and, as such, be binding upon all within the sphere of his legal and constitutional authority.

Later in 1880, in *Blake* v. *United States*, 103 U. S. 227, 231, 232, the court said:

> From the organization of the government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in the absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government.
>
> * * * * *
>
> During the administration of President Tyler, the question was propounded by the Secretary of the Navy to Attorney General Legare, whether the President could strike an officer from the rolls, without a trial by a court martial, after a decision in that offi-

> cer's favor by a court of inquiry ordered for the investigation of his conduct. His response was: "Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituents) for a breach of such a vast and solemn trust. 3 Story, Com. Const. 397, sect. 1538. It is obvious that if necessity is a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments. * * * I have no doubt, therefore, that the President had the constitutional power to do what he did, and that the officer in question is not in the service of the United States." The same views were expressed by subsequent attorneys general. 4 Opin. 1; 6 id. 4; 8 id. 233; 12 id. 424; 15 id. 421.
>
> In *Du Barry's Case* (4 id. 612) Attorney General Clifford said that the attempt to limit the exercise of the power of removal to the executive officers in the civil service found no support in the language of the Constitution nor in any judicial decision; and that there was no foundation in the Constitution for any distinction in this regard between civil and military officers.

In 1904 Justice Van Devanter, then Circuit Judge, in *In re Brodie*, 128 Fed. 665, 668, quoting the above language from *United States* v. *Eliason*, *supra*, said further:

> * * * Subject to the Constitution and to the laws of Congress, the President, as commander in chief, is authorized to establish and enforce such rules and regulations for the government of the army as he may deem essential to the maintenance of a high standard of efficiency, discipline, and honor, and, as a means to this end, may properly provide for the trial of accusations against persons in the military service, and for the punishment of offenses by them. * * * Nor is it necessary for the Secretary of War in promulgating such rules or orders to state that they emanate from the President, for the presumption is that the secretary is acting with the President's approbation and under his direction. *Parker* v. *United States*, 1 Pet. 293, 297, 7 L. Ed. 150; *Wilcox* v. *Jack-*

son, 13 Pet. 498, 512, 10 L. Ed. 264; *Williams* v. *United States*, 1 How. 290, 11 L. Ed. 135; *United States* v. *Freeman*, 3 How. 556, 566, 11 L. Ed. 724; *Confiscation Cases*, 20 Wall. 92, 109, 22 L. Ed. 320; *United States* v. *Farden*, 99 U. S. 10, 19, 25 L. Ed. 267; *Wolsey* v. *Chapman*, 101 U. S. 755, 769, 25 L. Ed. 915; *United States* v. *Fletcher*, 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378; 7 Op. Attys. Gen. 453.

Lastly, Chief Justice Groner in 1940 in the case of *Davis* v. *Woodring*, 111 F. (2d) 523, on the authority of the Secretary of War to issue regulations, quoted with approval the foregoing quotation from *United States* v. *Eliason*, *supra*.

Such is, and must be, the rule today. The President under the Constitution is the commander in chief of the Army and Navy, and the Secretary of War is his authorized subordinate responsible for the government and discipline of the Army. Of necessity they have the power to discharge these constitutional functions. In order to discharge his duty as commander in chief of the Army and Navy the President necessarily has power to make rules to determine an officer's fitness to perform the duties of his office. This is the purpose of the Army Regulations providing for reclassification boards. These boards investigate an officer's fitness and recommend what shall be done with him. Surely the President as commander in chief has authority to establish such boards for his guidance and advice. They are not boards for the trial and sentence of offenders. At least they did not so function in this case. No charges of misconduct were preferred against plaintiff; his fitness to be an officer was questioned; this was all. It may be true that only Congress can provide for the trial of military offenders, but certainly the President can provide for an investigation into the fitness of an officer.

His plenary power to make rules and regulations for the government of the Army was never questioned by Congress until the days of Reconstruction when Congress passed the Act of July 15, 1870, c. 294, 16 Stat. 315, 319, section 20 of which provides:

> SEC. 20. *And be it further enacted*, That the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the

> army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session: *Provided*, That said regulations shall not be inconsistent with the laws of the United States.

But this provision was repealed by the Act of March 1, 1875, c. 115, 18 Stat. 337, and that Act further provided, "and the President is hereby authorized, under said section, to make and publish regulations for the government of the Army in accordance with existing laws." When the laws of the United States were codified on June 30, 1926, these Acts were incorporated in the Code (sec. 16, title 10, U. S. C.) in the following language:

> 16. *Regulations for government of Army.*—The President is authorized to make and publish regulations for the government of the army in accordance with existing laws, which shall be in force and obeyed until altered or revoked by the same authority: *Provided*, That said regulations shall not be inconsistent with the laws of the United States.

Thus, if Congressional authority were necessary to enable the President to promulgate the questioned regulations this power has been expressly granted by the Act of March 1, 1875, *supra*.

The authority of the Secretary of War to do so on behalf of the President cannot be doubted. See the authorities above cited and also *Myers* v. *United States*, 272 U. S. 52, 117, and *In re Smith*, 23 C. Cls. 452, 458. *Runkle* v. *United States*, 122 U. S. 543, 557, upon which plaintiff relies, says:

> There can be no doubt that the President, in the exercise of his executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this court. *Wilcox* v. *Jackson*, 13 Pet. 498, 513; *United States* v. *Eliason*, 16 Pet. 291, 302; *Confiscation Cases*, 20 Wall. 92, 109; *United States* v. *Farden*, 99 U. S. 10, 19; *Wolsey* v. *Chapman*, 101 U. S. 755, 769.

Plaintiff relies on this case because it was there held that the President could not delegate to the Secretary of War power to review the sentence of a court martial dismissing an officer, in view of the 65th Article of War which provided that "no sentence of a court martial * * * extending to the loss of life, or the dismission of a commissioned officer, * * * shall be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case."

That case has no application here. Charges were not preferred against plaintiff, and he was not sentenced; only his fitness was questioned. When investigation showed him to be unfit, the Secretary of War discharged him, "by direction of the President," but his discharge was honorable.

The President, independent of the Board proceedings, had inherent power to discharge him, *Blake* v. *United States*, *supra; Myers* v. *United States*, *supra;* but if he had not had such power, it was expressly granted by section 37 of the Act of June 15, 1933, c. 87, 48 Stat. 154. In that section it is said,

> * * * Any officer of the Officers' Reserve Corps may be discharged at any time in the discretion of the President.

Nor can it be questioned that the act of the Secretary of War was the act of the President. The letter of discharge signed by the Adjutant General "by order of the Secretary of War" recited, "* * * you are, by direction of the President, honorably discharged * * *." This was the form of action taken in *Myers* v. *United States*, *supra*. In that case Myers, a postmaster, was dismissed by the Postmaster General by telegram reading in part, "* * * order has been issued by direction of the President removing you from office of postmaster * * *." (See Finding II, 58 C. Cls. 200.) It was the identical form of action taken in *Reaves* v. *Ainsworth*, 219 U. S. 296, 303. In neither case did the Supreme Court expressly approve it, but it was approved by the Court of Appeals of the District of Columbia in *Weeks* v. *United States ex rel Creary*, 277 Fed. 594, and

on appeal by the Supreme Court reported in 259 U. S. 336, and in *United States ex rel. French* v. *Weeks*, 259 U. S. 326. In that case general authority had been conferred on the Secretary of War by the President to carry out the provisions of the statute relative to the classification and discharge of officers. How authority was conferred on the Secretary of War in this case is not alleged, but that it was authorized we do not doubt. The statement in the letter that he was discharged "by direction of the President" certainly is presumptively correct. *Runkle* v. *United States*, *supra*.

His discharge being an administrative matter, the President had power to delegate authority to the Secretary of War to discharge him. *United States ex rel. French* v. *Weeks*, 259 U. S. 326, 334.

Defendant's demurrer is sustained and plaintiff's petition is dismissed. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JONES, *Judge*, took no part in the decision of this case.

SEATTLE DISTRICT NO. 3 MANTLE CLUB v. THE UNITED STATES

[No. 45228. Decided December 7, 1942. Defendant's motion for new trial overruled March 1, 1943]

On the Proofs

Excise tax; club dues; social activities subordinate and incidental to other purposes.—Where among the proposed activities of plaintiff organization, as set forth in its organization prospectus, the greatest emphasis was in practice placed on the improvement of the member's "ethical standards, his business standing and his financial status"; and where the monthly meetings of the members were held in a public auditorium and at such meetings a message was read from the national founder of the club, dealing with ethical and moral topics; and where the organization had no clubhouse, no dining room, no bar, no game room, no library, no gymnasium nor any other of the facilities commonly afforded by a social or athletic club; it is *held* that the social activities of the organization were "subordinate and merely incidental to the active furtherance of a different and dominant purpose" within the meaning of the Treasury Regulation and consequently un-

der the provisions of section 501 (a) (1) and (2) of the Revenue Act of 1926, as amended by section 413 (a) of the Revenue Act of 1928 (Internal Revenue Code, section 1710) plaintiff is entitled to recover taxes imposed as upon a social or athletic club.

Same; stated purpose of organization.—The stated purpose of an organization does not determine its taxable status under section 501 (a), as amended, if its actual operations are different from such stated purpose.

The Reporter's statement of the case:

Mr. Paul F. Myers for the plaintiff. *Messrs. James Craig Peacock* and *Maurice R. McMicken* were on the briefs.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is, and at all times material to this action was, an unincorporated association of persons in Seattle, Washington, and adjacent territory, organized under a charter granted in 1934 by the Mantle Club, an unincorporated association organized in New York City in 1929 and now comprising some 30 district units in large cities throughout the United States, of which the Mantle Club of Seattle is District No. 3.

2. The constitution and by-laws of the parent or chartering Mantle Club, under which plaintiff has always functioned, set forth the following purposes:

> (1) To unite fraternally and for mutual benefit, protection, improvement and association loyal American male citizens of sound body and health not less than twenty-one nor more than forty-five years of age, of good moral character and of reasonable desire and ambition to improve themselves and willingness to help others.
>
> (2) To foster and cultivate the social, educational and business relations of the members; to improve their standards of honor, ethics, efficiency and productivity; to broaden their interests in the pursuit of their occupations; and to encourage among the members a true feeling of friendship and a friendly spirit of mutual cooperation.
>
> (3) To gather, receive and disseminate such information as may seem helpful to the members; to render

mutual assistance by the interchange of knowledge and experience along helpful lines.

(4) To forward and promote the general welfare and prosperity of the members and to improve by any and all lawful and honorable means their status and condition.

(5) To erect, equip and maintain social club houses and other appropriate buildings for the use and enjoyment of all the members of the Club upon and under such terms and conditions, and subject to such rules, regulations and restrictions as are for the best interests of the members.

(6) To assist in any other matters pertaining to the progress and advancement of the members to the highest order of American citizenship.

(7) To develop, foster and maintain by every honest, honorable and legitimate means, activities and interests which shall benefit and improve the general welfare of the people of any community, any State or any part or portion of the United States of America.

3. The following provisions of section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928, comprise the applicable provisions of law involved in this action:

SEC. 501. (a) There shall be levied, assessed, collected, and paid a tax equivalent to 10 per centum of any amount paid—

(1) as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25 per year; or

(2) as initiation fees to such a club or organization, if such fees amount to more than $10, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of $25 per year.

* * * * *

(c) There shall be exempted from the provisions of this section all amounts paid as dues or fees to a fraternal society, order, or association, operating under the lodge system, * * *.

4. Defendant through its Collector of Internal Revenue at Tacoma, Washington, collected from plaintiff, on the dates and in the amounts hereinafter set forth, taxes on initiation

fees under section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928:

December 11, 1935 (including penalty and interest)	$7,077.61
April 29, 1936	228.00
May 27, 1936	956.00
June 12, 1936	1,154.00
Total	$9,415.61

These taxes were assessed on the full amounts collected from members on account of initiation fees, and were paid by plaintiff out of its own funds.

5. Plaintiff filed a timely claim for refund, the grounds of which were:

> 1. That claimant is not a "social, athletic or sporting club or organization" within the meaning of section 501 (a) (1) and (2) of the Revenue Acts of 1926, as amended by section 413 of the 1928 Revenue Act, and accordingly its initiation fees are not taxable under such Act.
>
> 2. The claimant is a "fraternal society, order or association operating under the lodge system," and accordingly under section 501 (c) of the Revenue Act of 1926, as amended by section 413 of the 1928 Revenue Act and Article 38 of Regulations 43, claimant is specifically exempted from the payment of the 10% tax on initiation fees imposed by said act.

The second ground asserted in the claim for refund has been abandoned by plaintiff.

6. Plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue on July 28, 1938. In the letter of rejection the Commissioner listed the purposes of the Mantle Club as set out in its constitution and bylaws, and said:

* * * * *

> As shown by the constitution and bylaws, some of the purposes of the Mantle Club are social in nature and one of the aims of the club is to maintain clubhouses for the use of members. The evidence shows that there are various social and athletic activities among members and except for the regular meetings, at which talks are given on character building, etc., the evidence does not disclose any active work of a serious nature.

* * * * *

It has been held that the Mantle Club qualifies as a social, athletic or sporting club or organization and that the initiation fees are properly subject to the tax imposed by section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928.

It is held that the amount in question represents tax, penalty, and interest properly due and paid.

The claim is rejected in full.

7. On June 28, 1938, a letter was addressed to the Mantle Club, Wilmington, Delaware, in reference to the liability of the Mantle Club, Seattle, and the various other branches located in other cities, for collection of tax on initiation fees under the provisions of section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928. After setting out the provisions of the constitution and by-laws of the Mantle Club, the letter, signed by D. S. Bliss, Deputy Commissioner, followed the phraseology of the letter of July 28, and concluded as follows:

> It is held that the Mantle Clubs qualify as social, athletic or sporting clubs or organizations and that the initiation fees are properly subject to the tax imposed by section 501 of the Revenue Act of 1926, as amended by section 413 of the Revenue Act of 1928. It has been held that the Mantle Club of Seattle, Washington, and the other branch clubs must collect and account for the tax on initiation fees paid by members of the club.

8. The taxability of plaintiff's initiation fees had been in question between the plaintiff and the Collector at Tacoma, Washington, and between that office and the Commissioner of Internal Revenue, as a result of which the Collector was directed to secure a list of members so that steps could be taken to make an assessment against them.

The Collector, on November 29, 1935, notified the Commissioner of Internal Revenue that plaintiff's secretary refused to sign a return because he believed the club operated under the lodge system but desired that the plaintiff, rather than the individual members, be allowed to make payment of the tax upon determination by the Commissioner, or the courts in case of suit, that the tax attached. Thereupon plaintiff requested of the Collector that it be permitted to file a return and pay the tax giving a waiver of the right to

file a claim for refund on behalf of its members since it had not collected the tax from them. The waiver provided that:

> * * * the taxpayer does not, however, waive rights to a claim for refund on the ground that there is no tax liability on the part of either the club or its individual members within the meaning of the Revenue Act.

9. The Mantle Club is an unusual organization, largely the creation of H. B. Monjar, its founder, whose ideas, personality, and purposes permeate and control the entire organization. The membership includes men from 21 to 45 years of age, and the organization is managed in an autocratic manner, with insistence on implicit obedience to rules.

10. All district clubs are supervised by the National Board of Governors which commends or disapproves their various activities.

The constitution limits the membership in the entire organization to 100,000, the National Board fixing quotas for various large cities of the country according to their population. Plaintiff, District Club No. 3 at Seattle, was increased in its quota from time to time until finally its quota was fixed in 1936 at 3,000 members.

11. Plaintiff had no clubhouse. The matter of building a clubhouse had been mentioned upon occasion from the time of formation of the club, and was a hope of the membership. It was one of the national club's objectives, as set forth in paragraph (5) of the statement of the aims and purposes in the constitution of the national club, which appears in Finding 2. Plaintiff's quarters were a suite of business offices in an office building in the business district of Seattle.

12. The prospectus of the Mantle Club contains, among other provisions, the following:

> Anyone applying for membership must vouch for his belief that an organized group with a definite plan has infinitely more power to accomplish worthwhile objects for himself and others than he has, alone and unaided. He must also be ready to settle down in the community. No one can be admitted to membership unless vouched for by a present member and favorably approved by the Board of Governors.
>
> We desire earnest and ambitious men who are willing to work diligently for success in their chosen lines, who

desire to help other members reach the same objective and who want to take some action, not some other time, but RIGHT NOW to bring about such results.

The purposes of the club briefly, are as follows:

1. Fraternal association such as other fraternal organizations of high standing furnish to their members, but with broader contact due to the provision that all members must attend meetings.

2. To aid the member in every honorable and legitimate manner possible, to improve his ethical standards, his business standing, and his financial status.

3. To develop and maintain activities and interests which shall benefit and improve the welfare of the people of any community or state or any part of the United States of America.

All members of this organization will be gauged and rewarded according to that which they accomplish for the organization and for themselves through the organization, and their outside standing, whether financial, political, or social, will have no effect whatever on their status as members.

The only requirements financially are the Initiation Fee and monthly Dues, which are to be used to accomplish any of the general purposes of the Club. The Initiation Fee is Twenty Dollars and must be paid at the time application for membership is made. The Dues are Two Dollars per month and must be paid in person at the monthly meeting of the organization, which the member faithfully agrees to attend. The only other obligation imposed on the member is that he places himself on honor not to divulge any information he may later accumulate as to any of the activities, personnel, or plans of the organization, and even this memorandum is understood to be personal and confidential.

Every member receives for his money the usual benefits and privileges of a fraternal organization, supplemented by a larger and broader contact with fellow members, due to each member attending the regular monthly meeting, and to the system of contact used by the Mantle Club. That is all that he pays his initiation fee and dues to receive.

The other and major benefits are a result of the cooperation of the group under a definite system and plan, and represent additional privileges secured by group interest and application, and not by the payment of money.

The real basis of power of this organization is the ability to stick together and work together. If you

are the type of man who wants to change his mind after giving his word, we do not want you in the organization at all. We want men with a real sense of business honor—men whose word really means something and who will keep their agreements and their promises of their own volition and without the necessity of reminding them of their obligations.

This organization is run for the purpose of getting results for all of its members and not with an idea of catering to any individual member or any group of members. It is, therefore, run along lines of a business organization, power being concentrated in the hands of a few men who know what has to be done and how it should be done.

13. In order to accomplish the purposes of the organization plaintiff club held numerous meetings, as described hereinafter, practically all of which were devoted to lectures or readings about, and discussion and study of, ideals and principles of honor, loyalty, common sense, courage, justice, ambition, pride, self-control, confidence, energy, responsibility, self-respect, and other desirable qualities, and the importance of the application of these virtues to the everyday lives of individual members.

Great importance was attached to attendance on monthly and other meetings, prompt payment of dues, the contact of prospective members and obtaining new members, as well as zeal in promoting the other activities of the club. Records were kept, and a member was advanced in the club according to the marks that he merited and received.

14. The largest of the meetings was an official monthly meeting which the entire membership was required to attend. This was held on the first Monday of each month in a large auditorium, the attendance averaging approximately ninety per cent. The meeting was opened with patriotic ceremonies, presentation of the flag, and musical numbers or other form of entertainment. At each meeting the monthly message of Mr. Monjar was read, relating to some subject, such as honor, loyalty, common sense, justice, courage, ambition and pride, energy, self-respect and other ethical traits. Addresses were delivered on these subjects and the application of the relevant ethical principles to the daily lives of the members. The principal method of impressing these ideas on the mem-

bers was repetition of them, which became boring to some members and caused them to drop out of the club. On the other hand, many members found the meetings beneficial.

15. Other meetings of the club were held on succeeding Mondays of each month, sometimes in "sections" of 1,000, and regularly in "divisions" of approximately 100, and also in "captains' groups" of 10 members. Halls would have to be rented for section meetings but division meetings were held in restaurants and churches, preceded by dinner, while captains' group meetings were often held in homes of members. These were called "privilege" meetings as attendance was not compulsory. However, since the merit records of members were advanced by assiduous attendance and zeal in the work, the attendance ratio even at the "privilege" meetings averaged from sixty to seventy five per cent. The nature of these meetings and the subjects discussed were similar to those of the official monthly meetings except that in the smaller division and group meetings the individual members had more opportunity for expression. The use of liquor was not permitted at any meeting or activity of the club, or on the way thereto or therefrom. No smoking was permitted at meetings.

16. Full minutes were regularly kept of the official monthly meetings, division meetings and meetings of the Local Board of Governors, in which were recorded the nature of discussions and actions of the club. Beginning some time in 1934, minutes of captains' group meetings were also kept. The minutes contain many references to announcements of the social and athletic activities of the club, which will be treated hereafter in Findings Nos. 25 and 26.

17. There were also assimilation meetings for the purpose of familiarizing members with the purposes of the order, especially as set forth in the prospectus, and to explain the prospectus so as to attract new members—this being a feature of the club work greatly emphasized and efficiency in which to a large extent measured a member's marks of merit and entitled him to advancement. The large membership of the club was built up in this manner.

18. Membership consisted of two classes: "associate" and "full". All members were originally associate members and

advanced by merit, as determined by record marks as evidence of their zeal in the activities of club work, until they were admitted into full membership when they were carried through an elaborate and serious initiation ceremony and became entitled to vote. The fee for initiation as associate members was $20. The monthly dues were $2. The entire initiation fee and one-half of the dues went to the national organization, which has accumulated at the present time a reserve of approximately one million dollars.

19. The Local Board of Governors together with section and division heads and captains constituted the "contact structure" which held many meetings. Through this contact structure information was conveyed from local board to section head, to division head, to captain, to members, and vice versa through the same line. This system was actively used not only for transmitting information in both directions, but for questions and answers pertinent to the obligations and duties of members.

20. On May 31, 1936, 343 out of 3,078 members had become full members, but by the end of 1937 more than 90% had become full members.

During the period from November 11, 1933, the approximate date of organization, to May 31, 1936, plaintiff received into membership a total of 3,940 men. Its actual membership on December 31, 1934, was 510; on June 30, 1935, 2,499; on December 31, 1935, 2,237; and on May 31, 1936, 3,078. During this whole period a total of 852 men were dropped from membership.

21. The total number of meetings conducted by plaintiff during 1934, 1935, and 1936, not including ritual meetings, committee meetings and local board meetings, was approximately 14,242.

22. The monthly messages from Mr. Monjar, the founder, which were read at each official monthly meeting, and at other meetings, became available in printed form through publication in "The American Key", a monthly magazine published independently by the national leaders of the Mantle Club, of which Mr. Monjar was the editor and guiding spirit. This magazine was distributed at 25 cents a copy at the various meetings. The monthly messages for June

1934 through August 1936 were published in book form entitled "Code of Ethics", which sold for $2. This volume was virtually the text book of the organization and was widely distributed among the members. The purchase of the magazine and the Code of Ethics was encouraged by the leaders of the club. Copies of the magazine are in evidence as plaintiff's exhibits Nos. 3 to 10, inclusive, and the Code of Ethics as plaintiff's exhibit No. 30. These exhibits are made a part of this finding by reference.

23. The Mantle Club also fostered certain business plans which were frequently referred to in the various meetings held by the membership. In connection with these plans the following is an extract from a set of questions and answers used in the early days in training captains and other officers:

> The Mantle Club has a definite fraternal set-up, concerning the handling of the group that will set up an efficient machinery of *MEN*. The details of this plan will gradually be revealed to the members as they earn the right to this information. In addition to this, the founder of the Mantle Club has a definite set of business plans that will produce business results for every man in the organization if he will prove up, through the set-up of the Mantle Club. These plans, of course, must be worked through regular business channels, because they have to do with profit making and are the personal property of the founder and not of the club or its membership. They are based on the cooperation of the group. It will require a national membership to put these plans into operation. The member is not buying a place in these plans with his $20. His record in the Mantle Club will entitle him to the opportunity to participate in these plans.

24. On several occasions during the period involved, a considerable number of members of the Seattle Mantle Club were asked by officers of the club to remain at the conclusion of the various meetings, when officials of plaintiff offered this selected group of members the "privilege" of lending money to Mr. Monjar for which no interest was paid and no time for repayment set except such time as he saw fit, as well as the privilege of investing in some enterprise promoted by Mr. Monjar. A large number of members took advantage of these "privileges" because of their absolute faith in Mr.

Monjar. The funds so loaned or invested were paid in to certain officers of the Seattle Mantle Club in monthly installments. Members resigning from the club were paid back any money they had so loaned or invested.

25. From practically the date of formation of the club, plaintiff had a "welfare committee" appointed by the Local Board of Governors, whose function, among others, was to control and stimulate so-called "unofficial activities" of the club. Subdivisions of the welfare committee were the employment committee, sick committee, recreation committee and entertainment committee. Affairs conducted by the recreation committee and the entertainment committee included, in addition to the dinners for the division meetings, ice skating parties, swimming parties, fishing derbies, card parties, motion pictures, dances, annual picnics, minstrel shows: some twenty-nine separate affairs in all, not counting the dinners preceding the division meetings. The club had a band, an orchestra, a glee club, and a drum and bugle corps. It supported athletic teams which represented it in the following games and sports: Hockey, basketball, baseball, indoor baseball, soft ball, bowling, golf, and tennis. The athletic teams were at times members of city leagues. At many of these activities prizes were awarded.

These activities were termed "unofficial activities" by the Local Board of Governors, and it warned against and discouraged their "over-emphasis" in relation to the serious work of the club. No credit points for advancement in the club were given for such activities. However, at the official monthly meetings, the division meetings and the group meetings, announcement was made about these activities, and their support was emphasized, discussed, and urged upon the membership by those interested in the activities. They were sponsored by plaintiff club, and without that sponsorship could not have been held. A member of the Local Board of Governors was a member of the welfare committee, which had supervision over these activities and the treasurer of the welfare committee was also a member of the Local Board, although the funds came from the activities and were no part of the official funds of the Seattle Mantle Club. The receipts of the welfare committee in 1935 were $1,408.17, its

expenditures $1,536.30, leaving a deficit of $128.13; in 1936 receipts were $3,547.35, expenditures $1,826.18, leaving a balance of $1,733.28. These expenditures included, at least in 1936, an unproved amount for the sick committee and the Christmas fund.

26. The promotion and development of friendship among the membership was particularly stressed. The dinners for members preceding the division meetings of the club provided companionship and socialibilty. The picnics and other social activities afforded members and their wives opportunities for pleasure and also tended to mitigate such opposition as there may have been on the part of wives to frequent attendance at meetings as required of their husbands. Practically all the social activities participated in were limited strictly to members and their families, and were for the purpose of creating a closer relation between the members in the various activities of plaintiff club.

27. The social and athletic activities of plaintiff club were not a material purpose of the club, as it actually operated during the time here in question, but were subordinate and merely incidental to the predominant purpose of the club, which was the study and discussion of ethical principles.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover taxes, together with penalties and interest, paid by plaintiff on the initiation fees of its members from 1933 when plaintiff club was organized, through May 1936. The tax was not collected by plaintiff from its members when the initiation fees were paid, and later when the Collector made demand for the tax the plaintiff elected to pay it itself rather than to allow it to be assessed against its members. Its members have not reimbursed plaintiff for the tax so paid. If plaintiff was a "social, athletic, or sporting club or organization" during this period, the tax was due under Section 501 (a) (1) and (2) of the Revenue Act of 1926 as amended by Section 413 (a) of the Revenue Act of 1928, now Section 1710 Internal Revenue Code, and cannot be recovered. Plaintiff denies that it was such a club. In its petition plaintiff made the further claim that even if it

did answer the description of a "social, athletic, or sporting club", its initiation fees were still not taxable because it was a "fraternal society, order, or association operating under the lodge system", and therefore exempt under subdivision (2) (c) of the sections above cited. This latter contention has been abandoned, leaving only the one issue as stated above.

The question of social club *vel non* has been litigated in numerous cases, many of them in this court. Recent and rather complete citations of the cases have been made in *Engineers Club of Philadelphia* v. *U. S.*, 95 C. Cls. 42, 42 F. Supp. 182, and *Duquesne Club* v. *Bell*, 127 F. 2d 363 (C. C. A., 3d Cir.), and will not be repeated here. The decisions are, in general, mere expositions of the text of Article 36 of Treasury Regulations 43, in effect since its promulgation in 1917. Its relevant part is as follows:

> ART. 36. SOCIAL CLUBS.—Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an oportunity of congregating for social intercourse, is a "social * * * club or organization" within the meaning of the Act, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominant purpose, such as, for example, religion, the arts, or business. The tax does not attach to dues or fees of a religious organization, chamber of commerce, commercial club, trade organization, or the like, merely because it has incidental social features, but, if the social features are a material purpose of the organization, then it is a "social * * * club or organization," within the meaning of the Act. An organization that has for its exclusive or predominant purpose religion or philanthropic social service (or the advancement of the business or commercial interests of a city or community) is clearly not a "social * * * club or organization." Most fraternal organizations are in effect social clubs, but if they are operating under the lodge system, or are local fraternal organizations among the students of a college or university, payments to them are expressly exempt.

Our question is, then, whether plaintiff's social features were "a material purpose of the organization", or whether

they were, as plaintiff claims, "subordinate and merely incidental to the active furtherance of a different and predominant purpose * * *". We think they were the latter, and that plaintiff may recover the tax it was compelled to pay.

The constitution and by-laws of the parent Mantle Club, under which plaintiff functioned, are set out in Finding 2. In these club tax cases the stated purpose of an organization does not determine its taxable status, if its actual operations are different from the stated ones. Here, paragraph 2 of the by-laws states as one purpose of the club: "To foster and cultivate the social, educational and business relations of the members; to improve their standards of honor, ethics, efficiency and productivity; to broaden their interests in the pursuit of their occupations; and to encourage among the members a true feeling of friendship and a friendly spirit of mutual cooperation." Also, paragraph 5 states its purpose: "To erect, equip and maintain social club houses and and other appropriate buildings for the use and enjoyment of all the members of the Club upon and under such terms and conditions, and subject to such rules, regulations and restrictions as are for the best interests of the members." We shall see that these "social" purposes were not in fact carried out to an extent sufficient to bring the club within the taxing statute.

In securing members of plaintiff club, a lengthy prospectus, which is reproduced in Finding 12, was used. It makes no mention of social activities or advantages as such. It speaks of "Fraternal association such as other fraternal organizations of high standing furnish to their members * * *", and again of "the usual benefits and privilege of a fraternal organization", and these statements were probably meant to connote sociability. But the other items mentioned in the prospectus "to improve his [the member's] ethical standards, his business standing, and his financial status" were the ones that, in fact, received the attention of the club. The member's ethical being was exposed to improvement by an almost unbelievably heavy and constant dosage of the writings of the national founder of the club, H. J. Monjar. These writings, or "messages", took up, one by one, qualities such as honor, loyalty, common sense,

courage, justice, ambition and pride, self control, confidence, etc. They were long, platitudinous, repetitious, and hence dull. They seem, however, to have been well tuned to the membership, and to have given it substantially what it expected and paid for.

The monthly message was read at the monthly meeting of the whole Seattle Club, which comprised some 3,000 members in 1936. They met in the municipal auditorium which was hired for the meetings. Some former members testified that they were bored, or even put to sleep, by the reading of the message. Such reactions are understandable, but have no tendency to prove that the meetings were social.

Attendance at the monthly meetings was compulsory, and this rule was rigorously enforced. The dues of $2 per person were paid at the meeting. The initiation fee of $20 was collected before admission to the club. The Key magazine, published by Monjar and other leaders of the national Mantle Club, was sold for twenty-five cents a copy at the monthly meetings. It reprinted the preceding monthly message, and contained advice as to how to use the ethical principles of the message to work out the problems of the members. Two of Monjar's books were for sale at $2 each. They contained, in general, the same kind of material as the messages.

After the monthly meetings, which lasted from two and one half to three and one half hours, members who had progressed well in the work of the club were given the "privilege" of lending money to Monjar, through the managers of the Seattle Club, without interest and with no promise to repay the money at any particular time. The members who made these loans seem to have been impelled by their admiration for the character and ability of Monjar, principally as shown by his messages, and by some vague promise of large returns from their loans in the future.

Between the monthly meetings there were meetings of geographical subdivisions of the Seattle Club, Sections of 1,000, Divisions of 100, and Captain's groups of 10. They talked about practically the same things as were discussed at the preceding monthly meeting, but the lesser people had more opportunity to do the talking. In 1935 there were 6,582 meetings; in 1936, 7,248 meetings. Smoking at the

meetings, and drinking at and on the way to and from the meetings was forbidden. Minutes of all meetings were made and transmitted to the national office, and comments, sometimes severely critical, were sent back. Members' wives protested at the large number of evenings taken up by the meetings, and some members grew weary and dropped out.

By faithful attendance at meetings, and performance of other acts approved by the club, co-points were amassed, which, when sufficient, entitled the member to be made a "full member" by a somewhat elaborate ritual.

Plaintiff had no club house. Its permanent quarters were mere business offices and no sociability occurred there.

One of plaintiff's standing committees was a welfare committee, appointed by the Local Board of Governors, whose function was to have charge of the so-called "unofficial activities" of the club. Under this committee were several subcommitees, including a recreation committee and an entertainment committee. The Local Board of Governors tended to deemphasize the development of the recreational activities of the members. In 1934 the Board instructed the welfare committee as follows:

> Do not make a dance or a game a major activity. Welfare work is to be a help in time of need. Would it not be more laudable to help some one who needs it than spend money on basketball or something of that sort.

In 1936 the National Board reminded the Local Board that the chairmanship of the welfare committee was not an excuse for non-attendance at a captain's meeting, with the following admonition:

> This is something that should never have happened. On no account should an unofficial activity be ever allowed to interfere with the official functions of the official Contact Structure.

It should be observed that this message came soon after the question of plaintiff's liability for taxes was broached by the Government.

There were, in the three years in question here, some twenty-nine picnics and parties, including swimming, skating, fishing, and card parties, dances, and a minstrel show, held under club auspices. To these the wives and families

of the members were welcome. The club had no equipment or quarters for these affairs. There was no regularity about their occurrence. They were arranged for the occasion, just as a church or bar association or labor union might arrange an outing. None of these activities were financed from club funds, the welfare committee being required to support its own activities. The welfare committee had expenditures of $1,536.30 and a deficit of $128.13 in 1935, and a balance of $1,733.28 after expenditures of $1,826.18, including those for the Sick Committee and the Christmas Fund, in 1936.

At the beginning of the monthly meetings, there was, sometimes, music by the band, orchestra or glee club. There were announcements of impending parties and athletic contests. The length of time consumed by these announcements varied with the speakers, but was small in comparison with the hours devoted to the hearing and discussion of the message.

When the meetings of "divisions" of 100 members were held, in the neighborhoods where the members lived, the members frequently ate dinner together in a restaurant or a church, and then held their serious discussion in the same room. They had no regular place for such meetings, and by this method they obtained a meeting place, by buying the dinner. During these dinners the members engaged in ordinary social conversation.

While these activities of a recreational nature, when tabulated, look rather extensive, they were small in comparison with all the activities of the club, with its large membership. For example, these small teams of amateur players wearing the letters of the Mantle Club could not fix upon the Club the character of an athletic or sporting club. Any religious or educational or professional organization of men of 21 years and above would almost certainly produce athletic teams, in season. Five young men want to play basketball. They are members of the Mantle Club, so they go into their games wearing the Mantle Club name. They get the recreation committee to buy their suits, if they can, and pay for them out of the proceeds of a minstrel show or a dance. This does not make the club an athletic club. As to the parties and picnics, they are entirely comparable to the oc-

casional diversions of religious, business, professional and labor organizations. In estimating their weight in the whole of Mantle Club activities, we remember that there were, during this period, some 14,000 unquestionably serious meetings, large and small, devoted to the self-improvement of the members by instruction and discussion. In this comparison, the social activities were "subordinate and merely incidental to the active furtherance of a different and predominant purpose" within the meaning of the Treasury Regulation. Here, for a club of some 3,000 members, there was no clubhouse, no dining room, no bar, no game room, no library, no gymnasium, in short, none of the facilities commonly associated with social or athletic clubs. We conclude that the Commissioner of Internal Revenue should not have classified plaintiff as a social club, and that it is entitled to recover the taxes, penalties and interest collected from it.

It is so ordered.

WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JONES, *Judge*, dissenting:

I cannot agree to the conclusion reached by the majority.

A club may be of a dual nature. According to the regulations issued pursuant to the statute it is not necessary that a club be purely a "social, athletic or sporting" club in order for it to fall within the taxing provision. That need not be its major purpose. It is only necessary that such be one of its material purposes or activities.

It is difficult to escape the conclusion that these activities were a material part or purpose of the organization.

The welfare committee, appointed by the local Board of Governors and which included a member of the Board as one of its members, controlled and stimulated "unofficial activities" of the club. Subdivisions of the welfare committee included an employment committee, a sick committee, a recreation committee and an entertainment committee. There were dinners for division meetings, ice skating parties, swimming parties, fishing derbies, card parties, motion pictures, dances, annual picnics, and minstrel shows. Twenty-nine

separate affairs, not including dinners, preceded the division meetings. The club had a band, an orchestra, a golf club, and a drum and bugle corps. Athletic teams included baseball, basketball, hockey, indoor baseball, softball, bowling, golf and tennis.

While no clubhouse had been built it was one of the charter purposes and from the formation of the club was a hope of the membership. In the meantime quarters were rented in a business building.

The minutes of the monthly meetings were replete with references to announcements of social and athletic activities of the club.

True, there were many meetings at which discussion was had of ideals, including honor, loyalty, common sense, courage, justice, ambition, pride, self-control, confidence, energy, responsibility, and numerous other undisputed qualities recognized as desirable by all self-respecting people.

Much emphasis was placed at the monthly meetings on prompt payment of dues. The initiation fee was $20 and the monthly dues were $2. All of the initiation fee and half the dues went to the national organization which was largely under the control of a talented gentleman by the name of Monjar, who was the founder.

At each monthly meeting a message from Mr. Monjar was read. He peddled his meditations and palmed them off in the form of ponderous platitudes, and in effect at so much per platitude, or rather on a monthly installment basis. We are led to make this statement because of the amount of money which went to national headquarters, none of which does the record show ever came back to the local association, except in the form of preachments, tritish advice, and truisms, the points of which by repetition must have become as dull as an old froe, and the cost of which could have been but a small fraction of the total intake. Undoubtedly he was a genius at organization, and, while his messages were in no way objectionable and contained much of merit, stripped of their excess verbal baggage, they amounted to nothing more than a restatement of age-old and generally accepted principles and ideals.

The members listened to these messages. Why shouldn't they? They had paid for them. Listening to these ethical

discussions bored some of the members, even made some of them sleepy, but then there was a fine, in addition to the dues, if they didn't attend the meetings.

While there were regular meetings, and in the circumstances, a rather full attendance, we do not see how that alters the fact that the social, athletic, and sporting features were a material part or purpose of the organization. In fact, it is doubtful if the club could have survived but for such activities. It cost the member $20 to get in, but he could get out for nothing, and many of them probably would have done so but for the activities mentioned. However, with almost every conceivable kind of social, athletic, and sporting undertaking, plus the fact that many of their neighbors belonged and the possibility of business advantage, it is not unnatural that they should remain as members.

One natural inquiry is: Why did men join this organization? It does not seem possible that commonplace discussions of well-known principles could have been the chief inducement. Looking at the entire set-up, it is inescapable that at least a material part of the attraction was the desire for social contact with their fellow men, the desire to see and take part in the athletic events and of visiting with each other at the picnics and dinners. These things, the chance of rubbing elbows, of conversation with different individuals at their frequent meetings, which were usually accompanied with food of some kind, afford a more plausible explanation of why men wished to belong to the club.

It was not a poor man's club. The dues, initiation fees, and penalties for failure to attend show that only a man of fair means could afford membership.

The minutes of the meetings show that some form of social gathering and athletic features were almost always announced, evidently for the purpose of keeping up interest and thereby retaining membership so that dues would be paid regularly. Without these social and athletic attractions the club could not have lasted. Those in charge evidently realized this fact, as is shown by the gradually increasing attention paid these activities.

The Commissioner of Internal Revenue having decided the issue adversely, the burden of proof is on plaintiff to show that these activities were not a material part or pur-

pose of the organization. It has not discharged this burden.

I would hold that the social, athletic, and sporting features are a material purpose of the organization, and that it is therefore subject to the tax.

WHALEY, *Chief Justice*, concurs in this opinion.

THE INDIANS OF CALIFORNIA, CLAIMANTS, BY U. S. WEBB, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA v. THE UNITED STATES

[No. K-344. Decided October 5, 1942. Plaintiff's motion and defendant's motion for a new trial overruled January 4, 1943.] *

On the Proofs

Indian claims; recovery under special jurisdictional act; lands promised under treaties not ratified.—Under the terms of the special jurisdictional act of May 18, 1925, 45 Stat. 602, as amended by the act of April 29, 1930, 46 Stat. 259, it is *held* that the plaintiffs are entitled to recover, subject, however, to the deduction of offsets, if any, and reserving the determination of the recovery and the amount of such offsets, if any, for further proceedings, as provided in Rule 39 (a) of the Court of Claims.

Same; title under Mexican law.—Where the Indians of California consisted of wandering bands, tribes, and small groups who had been roving over the same territory before such territory was acquired by the United States from Mexico; and where said Indians had no separate reservations and occupied and owned no permanent sections of land; it is *held* that said Indians possessed no title to any particular real property existing under the Mexican law in California. *Hayt, Admn.* v. *United States and Utah Indians*, 38 C. Cls. 455.

Same.—Where the Indians of California did not qualify before the Commission created by the act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California;" it is *held* that whatever lands they may have claimed became a part of the public domain of the United States. *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance & Trust Co., et al.*, 265 U. S. 472.

Same; claim of session; use and occupancy.—The establishment by the United States of a commission to negotiate treaties with the Indians of California, in order to localize said Indians on particular tracts and confine them in certain defined sections, was not the recognition of a claim of cession under the Mexican or Spanish law or the use and occupancy of any definite country.

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*Petition for writ of certiorari denied June 7, 1943.

Same; promise made and not fulfilled.—In the negotiation of the 18 treaties with the Indians of California, which treaties were accepted by said Indians but were never ratified by the Senate of the United States, a promise was made to said Indians which was never fulfilled.

Same; moral claim; tort; plenary power of Congress.—Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim nor recognize a case sounding in tort but the Congress has repeatedly sent tort cases to said Court for adjudication under special jurisdictional acts, and Congress can confer on said Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action.

Same.—Congress in its plenary powers can recognize an equitable claim, a moral claim, or any claim on the conscience of the Nation. *United States* v. *Realty Company*, 163 U. S. 427, 440, 441.

Same.—In the instant case, the Congress not only has recognized an equitable claim but has gone further and has almost definitely defined the amount of recovery.

Same; legal claim.—No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained under the special jurisdictional act in the instant case.

Same; taking; interest.—There has been no taking which under the Constitution would require just compensation and which would involve interest.

Same; pleading; surplusage.—In construing a pleading, if the petition sets out a cause of action within the purview of the jurisdictional act and also contains other assertions or claims which do not fall within the rights conferred by the act, the latter can be excluded as surplusage and yet a good cause of action remains.

Same; special acts strictly construed; exception in Indian claims.—Special acts are strictly construed as a general rule but there are exceptions in Indian cases under the broad doctrine that the Indians are wards of the Nation. *Braden* v. *United States*, 16 C. Cls. 389, 411.

The Reporter's statement of the case:

Messrs. Earl Warren and *H. H. Linney* for the plaintiffs.
Messrs. Raymond T. Nagle and *George T. Stormont*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. This case is before the Court under the Jurisdictional Act of May 18, 1928 (45 Stat. 602) as amended by the Act

of April 29, 1930 (46 Stat. 259), which authorizes this Court to hear, adjudicate, and render final judgment, determining the equitable amount due from the United States on all claims of whatsoever nature the Indians of California, as defined in section 1 of the Jurisdictional Act above cited, may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in the state which the United States appropriated to its own purposes without the consent of said Indians; and to determine, adjudicate and render final decree in the matter of all equitable claims relating to the loss sustained by these Indians on account of their failure to secure and receive the lands, personal property, services, facilities, aids, improvements and compensation provided for or proposed in those certain eighteen unratified treaties executed by certain chiefs and headmen of the several tribes and bands of Indians of California and commissioners representing the United States, between March 19, 1851 and January 7, 1852.

2. The aforesaid eighteen treaties, on June 1, 1852, were transmitted by the President, Millard Fillmore, to the Senate of the United States for its constitutional action thereon. On June 28, 1852, the Senate, considering each of the treaties as in Committee of the Whole, unanimously refused to advise and consent to the ratification of all and several of the aforesaid eighteen treaties and ordered that the resolutions rejecting the treaties be laid before the President of the United States. The records of the United States Senate do not reveal the reasons for the adverse action on the aforesaid treaties.

3. The plaintiffs, herein designated as The Indians of California, comprise all those Indians of the various tribes, bands and rancherias who were living in the State of California on June 1, 1852, and their descendants living in the state on May 18, 1928—such definition and designation having been prescribed in the Jurisdictional Act.

In accordance with the provisions of sections 1 and 7 of the act, the Secretary of the Interior caused to be prepared a roll or census of the Indians of California which was finally

approved on May 17, 1933. The census roll is filed as a permanent record in the Bureau of Indian Affairs, Department of the Interior, Washington, D. C. It contains the names of 23,571 Indians who collectively under the appellation "The Indians of California" bring this suit.

4. Prior to May 14, 1769, the date of the arrival in the territory now comprised in the State of California of one of the first exploring expeditions of the Kingdom of Spain by way of Mexico, the Indians in the state lived in their primitive and aboriginal condition, divided into many separate and distinct bands, tribes and rancherias, enjoying the sole use, occupancy and possession of all the lands in the State of California, undisturbed by any European power. The Kingdom of Spain extended its dominion over what is now the State of California, and under its protection, the ecclesiastical authorities established Catholic missions, twenty-one in number, along the western coast of California from the city of San Diego to Sonoma, north of San Francisco, California, but leaving the greater part of the state to the free and undisturbed occupancy of the aboriginal inhabitants. In the year 1810, Mexico revolted and established its independence of the Kingdom of Spain in the year 1824. From that date the Indians of California were under the rule of the Mexican Republic. On May 13, 1846, a state of war was declared to exist between the United States and the Republic of Mexico. Peace between the two nations was re-established by the signing of the Treaty of Guadalupe Hidalgo, proclaimed by the President of the United States on July 4, 1848. All of the lands now included in the State of California were ceded to the United States by the Republic of Mexico in said treaty. Under and by the provisions of the first section of the protocol annexed to the Treaty of Guadalupe Hidalgo, which referred to and by reference adopted the third article of the Treaty of Louisiana, proclaimed October 21, 1803, the Government of the United States was required to maintain and protect the inhabitants of the State of California and other territory included in said treaty (a large part of the inhabitants of the State of California then being Indians in their aboriginal state) in the free enjoyment of their liberty, property and the religion which they profess.

5. Section 16 of the Act of March 3, 1851, 31st Congress, Session II, Chapter 41, (9 Stat. 631–634) entitled "An act to ascertain and settle Land Claims in the State of California," provided among other things as follows:

> SECTION 16. *And be it further enacted:* That it shall be the duty of the commissioners herein provided for to ascertain and report to the Secretary of the Interior the tenure by which the mission lands are held, and those held by civilized Indians, and those who are engaged in agriculture or labor of any kind, and also those which are occupied and cultivated by Pueblos or Rancheros Indians.

At the time of the passage of this act the greater portion of the Indian tribes and bands and rancherias in the State of California were uncivilized and earned their living, not by agriculture, but by fishing, hunting, and the gathering of seeds, acorns, and other nuts, fruits, roots, and the natural production of the soil, rivers, lakes, and streams of the State of California. The majority were untutored and illiterate and did not speak nor understand the English language. Lands occupied by the Indians had been invaded by thousands of white men who had come to California for the purpose of mining gold which had been discovered there in the year 1848. Lands occupied by the Indians were overrun; they were overwhelmed and surrounded by the invading host of white immigrants. The Indians of California did not present their claims before the commission created by the act above cited.

6. On or about March 18, 1851, and prior to the acquisition from Mexico of the territory now comprised within the State of California under the Treaty of Guadalupe Hidalgo, the tribes, bands, and rancherias of Indians then living in the State of California, including those named in the eighteen unratified treaties referred to and set forth in plaintiff's exhibit No. A, made a part hereof by reference, and the individual Indians comprised within said tribes, bands, and rancherias, and such individual Indians then living in the state as were not members of any such tribes, bands, and rancherias, lived on, occupied, used and possessed, by immemorial use after the manner and customs of Indians in the

aboriginal state, a vast area now comprised within the territorial limits of the State of California and estimated to contain more than 75,000,000 acres of land. The Indians, in large part, lived in a primitive condition, earning their living by hunting and fishing and the gathering of the natural products of the soil, the forest, streams, and lakes.

7. With the object in view of effecting a settlement with the Indians living in California of all their rights with reference to the occupancy and use of land in the state, the President of the United States, in accordance with the Act of September 30, 1850 (9 Stat. 544) appointed three commissioners for the purpose of conducting negotiations looking to the execution of treaties with the tribes, bands and rancherias of Indians in the State of California, acting through their chiefs, captains and head men representing them and acting in their behalf.

Between March 19, 1851, and January 7, 1852, both dates inclusive, the commissioners, acting under their special instructions from the Secretary of the Interior, met with the chiefs, captains and head men of the tribes, bands and rancherias of Indians in the State of California whose names are set forth in "Exhibit A" to the petition. At the special instance and request and upon the invitation of the aforesaid commissioners representing the United States, the chiefs, captains and head men made, entered into and executed a series of eighteen certain treaties with the United States of America, copies of which are attached to the petition and marked "Exhibit A," and made a part hereof by reference.

8. The aforesaid eighteen treaties provided in substance that the tribes, bands and rancherias, and the individual Indians comprised within them, acting through their chiefs, captains and head men, acknowledged the sovereignty of the United States; undertook and promised to live on terms of friendship with the Government of the United States and its citizens, and with each other and all Indian tribes; to forego private retaliation and to assist in maintaining peace.

They further agreed to forever quitclaim to the government of the United States any and all lands to which they may ever have had any claim or title.

The treaties provided that certain delimited areas of lands within the territorial boundaries of the State of California should be set aside as reservations and "forever held for the sole use and occupancy" of the Indians signing the respective treaties. In some instances hunting and fishing rights were guaranteed outside the boundaries of the reservations.

In addition to these promises it was further provided that the United States should furnish to the Indians mentioned in each treaty, certain goods, wares and merchandise, live stock, clothing, implements of husbandry, subsistence supplies, and various educational, industrial, health and other facilities, including buildings and a general plan of administration of their affairs, with the object in view of establishing them in a new habitat and encouraging them to adopt a civilized mode of life.

9. After the rejection of the eighteen treaties by the Senate of the United States no further governmental effort was made to negotiate treaties with the Indians of California. The policy was adopted of dealing directly with them by legislation of the Congress and through the instrumentality of Executive Orders of the President. Indian Affairs in California were placed under the supervision and control of agents and other employees of the Indian Bureau, Department of the Interior. Such limited rights in land as the Indians of California now possess and enjoy were given to them by Acts of Congress, special and general, by purchase and by Executive Orders of the President.

10. The lands which were proposed to be set aside as reservations for the sole perpetual use and occupancy of the tribes, bands and rancherias of the Indians of California, parties to the eighteen unratified treaties, are described therein by metes and bounds. They are shown on the official map prepared at the request of the Secretary of the Interior by the Commissioner of the General Land Office as a public document. These reservations were never set aside and reserved to the Indians of California, parties to the said treaties, in the manner and form provided for therein.

The total area in the aforesaid proposed reservations has been officially computed to be eight million, five hundred and eighteen thousand, nine hundred (8,518,900) acres, and in-

cludes a large acreage comprised within reservations subsequently established by the Government for the benefit of the Indians of California.

11. The Attorney General of the State of California, in presenting the amended petition, is acting by and with the consent and authority of the State of California, expressed in the act of the legislature of California, Chapter 643, Statutes 1927, page 1092, entitled "An Act authorizing the Attorney General to bring suit against the United States in the Court of Claims in behalf of the Indians of the State of California in the event that the Congress of the United States authorizes the same," which act reads:

> SEC. 1. In the event that congress of the United States by legislation has heretofore or may hereafter authorize the attorney general of this state to institute a suit or suits in the court of claims in behalf of the Indians of the State of California, the attorney general is hereby authorized with the approval of the governor of this state to cause suit or suits to be instituted and to employ special counsel to assist in the prosecution of suit or suits and to pay all necessary expenses incident thereto from moneys appropriated to, the attorney general; provided, that the congressional authority therefor shall provide that in the event the court shall render judgment against the United States the State of California shall be reimbursed for all necessary costs and expenses incurred by said state; provided, that no reimbursement shall be made to the State of California for the services rendered by its attorney general in person.

12. On November 8, 1938, Earl Warren was duly elected Attorney General of the State of California, and on January 2, 1939, entered upon the performance of his official duties, succeeding U. S. Webb in that office. As the duly elected, qualified and acting Attorney General of the State of California, he is now performing all the duties in connection with this suit devolved upon him by the Jurisdictional Act (45 Stat. 602) and authorized by the act of the legislature of the State of California as set forth in Chapter 643, Statutes 1927, page 1092, quoted in Finding 11, hereof.

The court decided that under the terms of the jurisdictional act the plaintiffs were entitled to recover, subject,

however, to the deduction of offsets, if any, and reserving the determination of the amount of recovery and the amount of such offsets, if any, for further proceedings, as provided in Rule 39 (a) of the court.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This case comes to the court under a special private act of May 18, 1928, 45 Stat. 602, as amended by the act of April 29, 1930, 46 Stat. 259.

In 1850 the Congress passed an act carrying an appropriation "to enable the President to hold treaties with the various Indian tribes in the State of California." (9 Stat. 544,558.) Commissioners to negotiate treaties were appointed by the President and during the period from March 1851 to January 1852 negotiated eighteen separate treaties with some of the tribes and bands of Indians of California. These tribes and bands of Indians constituted about one-third to one-half of the total number of members of the tribes and bands in California at that time. The treaties were of the same general character. In each treaty there was set apart a certain district of country to be forever held for the sole use and occupancy of said tribes of Indians. The Indian tribes on their part agreed to forever quit claim to the United States any and all lands to which they or either of them now or may ever have had claim or title whatsoever. There were provisions made for the supplying by the United States to the Indians of cattle, farming implements, blacksmiths, and schools and teachers, to be maintained and paid for by the Government for a definite period. These treaties were transmitted to the Senate by President Fillmore. On June 28, 1852, the Senate refused to ratify all and several of the eighteen treaties.

The Indians of California consist of wandering bands, tribes, and small groups, who had been roving over the same territory during the period under the Spanish and Mexican ownership, before the treaty between Mexico and the United States whereby California was acquired by the United States. They had no separate reservations and occupied and owned no permanent sections of land. They and their forebears had roved over this country for centuries. They possessed

no title to any particular real property existing under the Mexican law in California. *Hayt, Admn.* v. *United States and Utah Indians*, 38 C. Cls. 455. Ex. Doc. No. 50, H. R. 30th Cong. 2d Sess. p. 77.

These Indians did not qualify before the Commission created by the Act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California." Therefore whatever lands they may have claimed became a part of the public domain of the United States. *Barker* v. *Harvey*, 181 U. S. 481; *United States* v. *Title Insurance & Trust Co. et al.*, 265 U. S. 472.

However, these Indians were roving over the State of California when the "gold rush" began and the white men paid no attention to any claims the Indians asserted to any portion of this territory. This resulted in bloody clashes and reprisals.

The object of the National Government in providing a Commission to negotiate treaties with these Indians was to localize them on particular tracts and confine them in certain defined sections. There was no recognition of a claim of cession under the Mexican or Spanish law or the use and occupancy of any definite country. It was simply a fair and just solution of a very troublesome situation in a newly acquired territory and was to avoid clashes between the white and red men. The Government simply held out a promise to the Indians that certain territory would be ceded to them for their permanent residence and certain provisions were made to civilize what were considered uncivilized tribes, bands, and groups. The Indians, bands, and tribes, who signed these eighteen treaties, on their part agreed to move to these reservations, relinquish all claim to any and all other lands, and to abide in peace and harmony with the white man.

There was a promise made to these tribes and bands of Indians and accepted by them but the treaties were never ratified so the promise was never fulfilled.

From 1852 this matter lay dormant for almost eighty years. In 1928, Congress passed a private act, 45 Stat. 602, *supra*, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purposes of this act the Indians

of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State.

SEC. 2. All claims of whatsoever nature the Indians of California as defined in Section 1 of this act may have against the United States by reason of lands taken from them in the State of California by the United States without compensation, or for the failure or refusal of the United States to compensate them for their interest in lands in said State which the United States appropriated to its own purposes without the consent of said Indians, may be submitted to the Court of Claims by the Attorney General of the State of California acting for and on behalf of said Indians for determination of the equitable amount due said Indians from the United States; and jurisdiction is hereby conferred upon the Court of Claims of the United States, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all such equitable claims of said Indians against the United States and to render final decree thereon.

It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief.

SEC. 3. If any claim or claims be submitted to said courts, they shall settle the equitable rights therein, notwithstanding lapse of time or statutes of limitation or the fact that the said claim or claims have not been presented to any other tribunal, including the Commission created by the Act of March 3, 1851 (Ninth Statutes at Large, page 631): *Provided*, That any decree for said Indians shall be for an amount equal to the just value of the compensation provided or proposed for the Indians in those certain eighteen unratified treaties executed by the chiefs and head men of the several tribes and bands of Indians of California and submitted to the Senate of the United States by the President of the United States for ratification on the 1st day of June, 1852, including the lands described therein at $1.25 per acre. Any payment which may have been made by the United States or moneys heretofore or hereafter expended to date of award for the benefit of the Indians of California, made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land, shall not be pleaded as an estoppel but may be pleaded by way of set-off.

SEC. 4. The claims of the Indians of California under the provisions of this act shall be presented by petition, which shall be filed within *three years* after the passage of this act. *Said petition shall be subject to amendment.* The petition shall be signed and verified by the Attorney General of the State of California. Verification may be upon information and belief as to the facts alleged. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give the said attorney access to such papers, correspondence, or furnish such certified copies of record as may be necessary in the premises free of cost.

SEC. 5. In the event that the Court renders judgment against the United States under the provisions of this Act, it shall decree such amount as it finds reasonable to be paid to the State of California to reimburse the State for all necessary costs and expenses incurred by said State, other than attorney fees: *Provided*, That no reimbursement shall be made to the State of California for the services rendered by its Attorney General.

SEC. 6. The amount of any judgment shall be placed in the Treasury of the United States to the credit of the Indians of California and shall draw interest at the rate of 4 per centum per annum and shall be thereafter subject to appropriation by Congress for educational, health, industrial, and other purposes for the benefit of said Indians, including the purchase of lands and building of homes, and no part of said judgment shall be paid out in per capita payments to said Indians: *Provided*, That the Secretary of the Treasury is authorized and directed to pay to the State of California, out of the proceeds of the judgment when appropriated, the amount decreed by the Court to be due said State, as provided in section 5 of this Act.

SEC. 7. For the purpose of determining who are entitled to be enrolled as Indians of California, as provided in section 1 hereof, the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause a roll to be made of persons entitled to enrollment. Any person claiming to be entitled to enrollment may within two years after the approval of this Act, make an application in writing to the Secretary of the Interior for enrollment. At any time within three years of the approval of this Act the Secretary shall have the right to alter and revise the roll, at the expiration of which time said roll shall be closed for all purposes and thereafter no additional names shall be added thereto: *Pro-*

vided, That the Secretary of the Interior, under such rules and regulations as he may prescribe, shall also cause to be made, within the specified time herein, a roll of all Indians in California other than Indians that come within the provisions of section 1 of this Act. [Italics ours.]

On August 14, 1929, the Attorney General of California, acting in his official capacity, duly filed in the Court of Claims of the United States a petition verified by him. The title of the case is "The Indians of California, claimants, by U. S. Webb, Attorney General of the State of California." A general traverse was filed by the Government.

After the period of three years, mentioned in the above act, in which a petition could be filed by the Attorney General of California, had expired, the Attorney General applied to the Court of Claims for leave to amend the original petition, which was granted and on March 14, 1932, an amended petition was filed. The defendant did not file a general traverse or other pleading to the amended petition. Both parties filed requests for findings of fact.

The plaintiffs' position is that, under the terms of the jurisdictional act, the Congress has admitted or assumed a limited liability arising out of the failure and refusal of the Senate to ratify the eighteen treaties, and the Court is only called upon to ascertain the amount due and enter a decree.

The defendant contends:

(1) That the original petition not being within the authorization expressed in the jurisdictional act, the Court is without jurisdiction of the amended petition, it having been filed after the expiration of the limitation contained in the jurisdictional act.

(2) That the claim arising out of the alleged failure of the United States to protect the asserted property rights of the plaintiff Indians under Spanish and Mexican law is without basis for the reason that they had no property rights as asserted.

(3) That the language of the jurisdictional act relied upon by the plaintiffs as creating a right of recovery through an implied ratification of the eighteen unratified treaties does not have that effect, but simply means that "equitable relief"

on the basis prescribed in the act shall be applied by this Court if the failure of the United States to perform its assumed obligation under the treaty of Guadelupe Hidalgo and protect the property rights of the Indians of California presents a basis for judicial relief.

(4) If the provision relied upon by the plaintiffs creates a liability out of an alleged moral obligation, power to adjudicate the claim arising thereunder is not conferred upon the Court by the terms of the jurisdictional act.

(5) The provision in question does not create or assume a liability but directs the Court to adjudicate a moral claim through the application of legal principles, and is therefore invalid.

The first contention of the defendant involves a question of pleading. It is asserted that the Attorney General of California, who, alone, was authorized and empowered to bring a suit in the Court of Claims for all the Indians of California, has failed to do so and has only sued for those bands and tribes mentioned in the eighteen unratified treaties and, as a consequence, a decree, if any, could only be entered in behalf of those bands and tribes.

In construing a pleading, the complaint as a whole must be considered and not particular and segregated sentences or paragraphs. The jurisdictional act which permits the suit to be brought must also be considered along with the claims made in the petition. If the petition sets out a cause of action within the purview of the jurisdictional act and also contains other assertions or claims which do not fall within the rights conferred by the act, the latter can be excluded as surplusage and yet a good cause of action remains. Special acts are strictly construed as a general rule but there are exceptions to the rule in Indian cases under the broad doctrine that the Indians are wards of the Nation. The well-established rule is that in construing a special act the Court will take into consideration the language of the act, the nature of the case, and the surrounding circumstances in order to ascertain and carry out the legislative intent. This rule goes back to the case of *Braden* v. *United States*, 16 C. Cls. 389, 411, and has been repeatedly followed in cases too numerous to cite.

The original complaint starts out by alleging that "the Indians of California, as hereinafter defined, acting herein by and through U. S. Webb, Attorney General of the State of California, * * * respectfully present the following facts."

There was no Nation, band, or tribe known or identified as the "Indians of California." As the defendant so aptly says, it is a term of art. But the jurisdictional act designates the Indians of California as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State."

In Paragraph XV of the original petition it is alleged "this petition is presented by the Attorney General of the State of California in conformity with and under authority of that certain Act of Congress, Public Law No. 423, 70th Congress, First Session, approved May 18, 1928, *acting herein* for and on behalf of the Indians of California as defined in said Act, which Act is entitled and reads as follows." [Italics ours.]

The Indians of California, as defined in the jurisdictional act, are *all Indians* who were on June 1, 1852, residing in that State, and their living descendants. It is true that Paragraph XVII of the original petition alleges the claimants are those Indians mentioned in the eighteen treaties. But this allegation can be stricken from the petition and there still remains sufficient to show a good cause of action as granted by the jurisdictional act. This allegation is mere surplusage and under the terms of the special act could be given no application. The act would not permit these particular Indians alone to either maintain a suit or to recover should the Court decree an award. In our opinion, the petition, taken as a whole, presents a cause of action for all Indians of California.

It may be mentioned also that, after the three year limitation clause in which a petition shall be filed by the Attorney General in behalf of these Indians, there follows the clause "Said petition shall be subject to amendment." The Congress must have felt that amendments to the original petition might be necessary when this clause was inserted. The insertion of this sentence after the limitation in which a petition

should first be filed could only mean that after the petition had been filed within the three years it was subject to amendment.

The plaintiffs filed, after the three-year period had expired, a motion to amend, and the Court, after due consideration, granted the motion, and an amended petition was filed. The amended petition simply clarified certain doubtful allegations, and made them more definite. There was no enlargement of the amount sought to be recovered in the orginal petition.

A liberal rule should be applied when the defendant has notice from the beginning that the plaintiffs set up and are trying to enforce a claim against it because of special conduct. *N. Y. Central R. R.* v. *Kinney*, 260 U. S. 340, 346.

The cases cited by the defendant are inapposite.

In *Choate* v. *Trapp*, 224 U. S. 665, 675, the rule of construction, recognized without exception for over a century, has been "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

The second contention of the defendant is an assertion of law. It is contended that, as these Indians had no claim under Spanish and Mexican law, any claim arising out of the failure of the United States to protect their property rights would be futile. This would doubtless be true if any such claim were made, but none is made.

The claim sued on is one arising under an act of Congress that says the promise made to these Indians in negotiating treaties with them, and afterwards not carrying out that promise by ratification, is sufficient to constitute an equitable claim allowing all the Indians of California to recover the amount specified in these unratified treaties, both in the value of the land promised to be set aside and the other compensation provided, and granted a right of action thereon.

Congress ripened the promise into an equitable claim. The failure of Congress to set apart certain reservations for these Indians in 1852, and its failure to provide the goods, chattels, school houses, teachers, etc. was recognized as a loss to these Indians and was made by the Congress an equitable claim to be paid in money value.

The act does not in any place set out a legal claim. It is the recognition of an equitable claim and is repeatedly so referred to in the jurisdictional act. Congress in its plenary powers can recognize an equitable, a moral claim, or any claim on the conscience of the nation. *United States* v. *Realty Company*, 163 U. S. 427, 440, 441.

In the instant case this is clearly admitted and recognized in the last paragraph of section 2 of the jurisdictional act which reads as follows:

> It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is *sufficient ground* for equitable relief. [Italics ours.]

It is in the power of Congress to grant any kind of relief which its wisdom dictates. There have been many instances of the recognition of moral claims, even gifts and bounties. Under its general jurisdictional powers the Court of Claims cannot pass on a moral claim, nor can it recognize a case sounding in tort. *Radel Oyster Co.* v. *United States*, 78 C. Cls. 816; *Mansfield et al.* v. *United States*, 89 C. Cls. 12; *Stubbs v. United States*, 86 C. Cls. 152. But the Congress has repeatedly sent tort cases to this Court for adjudication under special jurisdictional acts. The Congress can confer on this Court jurisdiction to determine any sort of claim which the Congress has converted into a right of action. *United States* v. *Realty Co., supra.*

In the instant case the Congress not only has recognized an equitable claim but has gone still further. The amount of recovery has been almost definitely defined. The land which is described in the respective treaties is to be valued at a fixed price. The chattels and other articles promised to be supplied are capable of having their value ascertained as of the date of the treaties. The value per acre is fixed in the jurisdictional act and it is only necessary to ascertain the number of acres in the reservations mentioned in the eighteen treaties. The chattels and services are named in the treaties so it is only necessary to ascertain the amount which would purchase them at the time when Congress failed to ratify the treaties.

As against this amount the jurisdictional act provides the Government may plead by way of set off "any payment which

may have been made by the United States or moneys heretofore or hereafter expended *to date of award* for the benefit of the Indians of California made under specific appropriations for the support, education, health, and civilization of Indians in California, including purchases of land." [Italics ours.]

There can be no denial of the fact that, when these Indians did not receive the eighteen separate tracts of land set aside for them in the treaties and the other perquisites therein mentioned, a loss was sustained by them which would not have happened if the Congress had carried out the promise by ratification of the treaties. Years afterward, the Congress recognized this loss to these Indians, and attempted to make restitution in money by converting this loss into an equitable claim and directing this Court to ascertain the amount in dollars and cents and enter a decree when the amount was ascertained.

This case does not involve the payment for land of which the Indians had a cession, or use and occupancy. No legal claim under any treaty or act of Congress setting aside land for the use of the Indians of California can be sustained. The decree can only be for a fixed amount of compensation. There has been no taking which under the Constitution would require just compensation to be paid and therefore would involve interest. The amount awarded would only be in full settlement of a recognized equitable claim which the Congress has ordered the Court to ascertain, and, after ascertainment, to enter a decree. The amount so recovered is not to go to the Indians of California per capita nor is it to be disbursed in any other individual manner. Under the jurisdictional act it is to be placed under the care of the Secretary of the Treasury, and draw four percent interest. That is not all. The Congress alone can appropriate from the fund, so established for the Indians of California, from time to time, such sum as, in its discretion, seems wise, and even these appropriations are to be "for educational, health, industrial and other purposes for the benefit of said Indians including the purchase of lands and building of homes"—beneficial purposes for the elevation and progress of these Indians to better citizenship.

The other contentions of the defendant are answered

by what has been said above. Further observation is unnecessary.

As this case is brought under Rule 39 (a), which provides the Court should decide only the law and facts, a judgment cannot be entered.

The Court is of the opinion that the plaintiffs are entitled to recover the value of the land set out and described in the eighteen unratified treaties at the price per acre named in the jurisdictional act, and the value of the other articles, chattels, and services as of the date of the failure of the Senate to ratify the treaties. As this claim does not involve a taking of land by the Government for which just compensation shall be made, but only compensation for an equitable claim, no allowance of interest is permitted or allowable.

The case will be referred to a Commissioner of the Court to ascertain the values and report to the Court. If a stipulation cannot be entered into, both parties may take testimony on these issues.

It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

JOHN M. WHELAN & SONS, INC., v. THE UNITED STATES

[No. 44022. Decided October 5, 1942. Plaintiffs' motion for new trial overruled February 1, 1943]*

On the Proofs

Government *contract; decision of contracting officer not arbitrary nor unreasonable.*—Where plaintiff, contractor, entered into a contract with the Government to furnish all materials and to perform all work for the construction of officers' quarters at Fort Monmouth, New Jersey, said work to be completed August 5, 1934; and where thereafter time for completion was extended, because of severe weather and extra work authorized by proper change order, until November 30, 1934, and the contract price was increased because of such extra work; and where on November 12, 1934,

*Petition for writ of certiorari denied June 14, 1943.

contractor ceased work, alleging that the defendant had breached the contract by the rulings of the contracting officer and the constructing quartermaster; and where thereafter, and after due notice, the contracting officer declared plaintiff in default as of December 4, 1934; it is *held* that such decision of the contracting officer was not unauthorized, arbitrary nor unreasonable, and plaintiff is not entitled to recover.

Same; protest; appeal.—Plaintiff did not protest the instructions, rulings and decisions of defendant's representatives under the applicable provisions of the contract and specifications and did not in any instance appeal from such decisions to the head of the department.

Same; wages to subcontractors working as mechanics.—The rulings of the constructing quartermaster and the contracting officer with respect to wages required to be paid to subcontractors who worked as mechanics were not arbitrary nor unreasonable and did not constitute a breach of the contract on the part of the defendant.

Same; counterclaim by defendant.—It is *held* that the plaintiff breached the contract by reason of its failure and refusal, as found by the constructing quartermaster and the contracting officer, to comply with the wage provisions of the contract and to proceed with the work; and accordingly the defendant is entitled to recover on its counterclaim for excess costs incurred in the completion of the project.

The Reporter's statement of the case:

Mr. Robert G. Kelly for the plaintiff. *Mr. George E. Beechwood*, and *Conlen, LaBrum & Beechwood* were on the brief.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Charles Bertrand Bayly, Jr.*, was on the brief.

The amount which plaintiff seeks to recover in this case is $37,789.29 as damages for the alleged breach by the defendant of a contract, and for balances due, for the construction of seven buildings for Army Officers' Quarters.

The defendant has interposed an amended counterclaim for $22,525.56, actual damages alleged to have been sustained for the alleged failure of the plaintiff, without justifiable cause, to proceed with the work and to complete the same as required by the contract and within the time fixed therein.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Pennsylvania corporation with its offices in Philadelphia.

October 31, 1933, defendant prepared and issued specifications for the construction of seven buildings for officers' quarters at Fort Monmouth, New Jersey, and in accordance with these specifications and the standard form of contract for such construction, issued an invitation for bids for the work to be done. The bids were to be opened November 17, 1933, at the office of the Constructing Quartermaster, Captain E. P. Antonovich, at Fort Monmouth. Pursuant to the invitation for bids and on the basis of the specifications and the standard form of the proposed contract accompanying the same, plaintiff on November 17, 1933, submitted its bid. Thereafter, on November 27, 1933, plaintiff's bid was accepted, and December 4, 1933, the contract, embodying the specifications upon the basis of which the bid was prepared, was executed by plaintiff, through its president, John M. Whelan, and by defendant, through Brigadier General P. W. Guiney, of the Construction Division, Quartermaster Corps, War Department, as contracting officer.

Under this contract and the specifications, schedules, and drawings forming a part thereof, plaintiff agreed to furnish all materials for and perform the work of constructing the seven officers' quarters at Fort Monmouth, New Jersey, for the agreed sum of $126,195 as stated in Article 1. Plaintiff's bid and Article 1 of the contract and the specifications fixed certain unit prices to be used in connection with certain extra work, if found necessary, and for certain increases or decreases in the contract price. A copy of the contract and specifications is of record as Defendant's Exhibit 5 and is made a part hereof by reference. Plaintiff's bid provided that work was to be commenced within 10 calendar days after date of receipt of notice to proceed and was to be completed within 220 calendar days from that date. The period for completion was fixed by plaintiff in its bid. The contract as executed provided that work was to be commenced December 28, 1933, and was to be completed about August 5, 1934.

On or about December 6, 1933, plaintiff executed and furnished to defendant a surety bond for the faithful performance of the contract and specifications. Written notice to proceed with the work called for by the contract and specifications was given plaintiff December 27, 1933, and work was commenced December 28, 1933. During the performance of the contract the time for completion of the work thereunder was extended 117 days, i. e., 27 days due to severe weather and 90 days on account of certain extra work authorized by Change Order A, thus fixing the completion date as November 30, 1934, and increasing the contract price because of Change Orders A and B to $127,750.62.

Captain E. P. Antonovich, Constructing Quartermaster, was the contracting officer's duly authorized representative on the job and supervised the work until its completion, and Ralph Schumann was defendant's inspector.

All letters of instruction, protest, or otherwise pertaining to this contract, which passed between the authorized officers of defendant and plaintiff, are of record as Defendant's Exhibits 1 and 2 entitled "Serial Memoranda."

2. The seven buildings, designated as houses "L," "K," "N," "W," "J," "U," and "V," provided quarters for ten officers, houses "J", "U" and "V" being double company officers' quarters. An Act of Congress approved February 25, 1927, 44 Stat. 1235, and Army Regulations dated November 28, 1933, limited the construction cost of field officers' quarters to $14,500 per house and company officers' quarters to $12,500 per house. The cost of the seven officers' quarters at such prices would be as follows:

"L" (Type "D" field)	$14,500.00
"K" and "N" (Type "C" field) at $14,500 each	29,000.00
"W" (Type "C" company)	12,500.00
"J", "U" and "V" (Double Company) at $12,500.00 each	75,000.00
	131,000.00

3. Articles 15, 18 (a), 18 (b), and 22 of the contract provided as follows:

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning

questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the contractor shall diligently proceed with the work as directed.

ART. 18. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages, which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. The contractor and all subcontractors shall pay not less than the minimum hourly wage rates for skilled and unskilled labor as follows:

Skilled labor	$1.20
Unskilled labor	.50

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee and shall furnish the contracting officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART 22. *Persons entitled to benefits of labor provisions.*—The contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

The Constructing Quartermaster required each mechanic and laborer to exhibit the amount of pay he received each week to a representative of the Constructing Quartermaster's office in order to check any possible violation of the

wage provisions of the contract. November 6, 1934, the Constructing Quartermaster began an investigation to determine whether plaintiff was paying the established rates of wages as provided in Article 22 of the contract, to certain subcontractors who worked as mechanics with tools. This investigation of the manner in which plaintiff was paying its mechanics disclosed that certain subcontractors who worked with tools were paid a lump-sum wage of $35.00 per week regardless of the hours they worked, and further, that after receiving their $35.00 weekly wage from plaintiff, they loaned each other money in order to pass before the Constructing Quartermaster's representative and exhibit the proper amount each would have received if paid on an hourly basis at the contract rate for his week's work. Plaintiff's authorized representative at the site was aware of this practice and instructed these mechanics to exhibit their pay in the manner described.

November 8, 1934, the Constructing Quartermaster advised plaintiff in writing that all subcontractors who worked as mechanics should be paid the prevailing rate of wages as provided in Article 22 of the contract. Plaintiff protested in writing and upon such protest the decision of the Constructing Quartermaster was approved by the contracting officer and the Quartermaster General, and plaintiff was advised by the contracting officer of his decision by letter dated November 14, 1934, as follows:

> This office is in receipt of instructions from the Quartermaster General, relative to the number of hours per week that foremen, who perform the work of laborers or mechanics, may work. Those instructions apply to work under your contract.
>
> The Quartermaster General holds that no executive, administrative, or supervisory employee of a contractor or subcontractor, shall be permitted to perform the work of a laborer or mechanic the full amount of time allowed for the class of labor performed and then continue directing the work of others. In other words, he shall not be permitted to work in a dual capacity, thereby depriving other laborers or mechanics of employment.
>
> The Quartermaster General lays down the following rule: Except in cases of emergency: an executive, ad-

ministrative or supervisory employee, that is, a foreman, who performs the work of a laborer or a mechanic in excess of 15 hours in any one pay period of seven (7) days, forfeits the privilege of unlimited hours and shall not be permitted to work *in any capacity* whatsoever during the pay period in which such work was performed *more than the number of hours as limited for laborers and mechanics.*

A foreman, in order to have the privilege of workin in excess of thirty hours in any one working week, may not work more than fifteen hours as a mechanic in that period. For example, a plastering foreman, working with tools not more than fifteen hours in any one working week, may work more than thirty hours per week. However, if he applies plaster for more than fifteen hours in that week, he may continue doing so in the same status as a mechanic up to thirty hours. But if he works in excess of fifteen hours as a mechanic, he is limited to thirty hours' work in any capacity, either as a mechanic or a nonworking foreman.

Provision is made, however, that a foreman who thus becomes limited to the hours prescribed for laborers and mechanics shall be allowed reasonable leeway for his paper work and the preparation of work schedules. This is to be taken that he may do his paper work on the job if he chooses, but is not in any way to direct other mechanics during the said period in which he may be performing his paper work.

The foregoing ruling applies with equal force to *subcontractors* working as mechanics, *regardless of contractual relationship between contractor and subcontractor*, as covered by Article 22 of your contract.

These instruction are effective at once upon all concerned.

The decision of the contracting officer was not arbitrary or unreasonable.

Plaintiff did not appeal to the head of the Department under Article 15 of the contract.

4. November 12, 1934, plaintiff stopped work under its contract, alleging that defendant had breached the contract by the rulings of the Constructing Quartermaster and the contracting officer, particularly with respect to wages required to be paid to subcontractors who worked as mechanics. The Constructing Quartermaster then requested plain-

tiff to resume work, which it refused to do, and on November 27, 1934, he wrote plaintiff as follows:

> The work under your contract No. 6148–79, which was stopped on November 12th, has not been resumed. Certain of the buildings and material remain unprotected against damage and deterioration.
>
> You are directed to resume construction under your contract at once or to advise this office in writing of your intended action toward the completion of your contract. Unless a satisfactory reply is received on or before December 4, 1934, action will be taken toward putting the contract in default and completing the work for your account.

After receiving the letter plaintiff persisted in its refusal to continue with the work and did not indicate in its reply any intention on its part to resume work. Defendant at no time prior to November 27, 1934, had threatened plaintiff with default.

December 3, 1934, plaintiff wrote Captain E. P. Antonovich, Constructing Quartermaster, as follows:

> Your letter of November 27, 1934, serial No. 256 at hand, also letters, serial numbers 244, 245, 252, 253, 254, and 249. In reply we wish to reiterate the verbal statement made by Mr. John M. Whelan to you, to the effect that we consider your orders unwarranted by and contrary to the terms of contract #6148–79 between our company and the Government. We consider your action in this matter a material breach of our contract.
>
> We wish to call your attention to an inaccurate statement contained in your letter of November 17, 1934, serial No. 249, in which you state that an understanding was reached regarding payment of wages to subcontractors including Joseph A. O'Connell. There was no such agreement. What you state as an understanding was not an understanding at all, but rather a demand made by you and emphatically refused by our representatives. We refused this demand at the time we stopped work and again at the conference which you refer to.
>
> You may consider this letter as notice that it is our intention to hold your office responsible for the damages caused by this breach as well as other breaches, changes, and extra work. We call your attention to the fact that you have in your hands the balance of the money appropriated for the construction of Officers'

> Quarters under contract 6148–79. You are hereby directed to reserve, out of such funds, monies sufficient to meet our claim for damages which are estimated to exceed $40,000.00. This obligation has already been incurred by the Government and is the first to be paid out of the balance of the fund. An itemized statement will be sent you at a later date.

December 10, 1934, the Contracting Officer declared plaintiff in default as of December 4, 1934, writing plaintiff as follows:

> Reference is made to your contract (#W–6148–qm–79, dated December 4, 1933) with the United States for the construction and completion of Three (3) Field and Four (4) Company Officers' Quarters at Fort Monmouth, N. J. According to the report of the Constructing Quartermaster in charge of the project covered by your contract you have done no work since November 12, 1934. On November 27, 1934, that official warned you that unless you either immediately resumed work, or advised him, in writing, as to your intentions, action would be taken looking to your being defaulted. You were called upon to reply to that warning by December 4, 1934, but no reply has been received.
>
> You are hereby informed that you are declared in default as of December 4, 1934, and your right to proceed with the work under the above-described contract is hereby terminated in accordance with the terms of said contract.
>
> A copy of this notice of default is being furnished to the surety on your performance bond (Fireman's Fund Indemnity Co.) and the surety will be given an opportunity to step in and complete the job. If the surety should not so elect, the United States will complete the work, and will look to you and your surety to make good any increased cost incurred by the Government.
>
> No further payments will be made to you until the contract work has been entirely completed.

This decision of the contracting officer was not arbitrary or grossly erroneous. Plaintiff did not appeal to the head of the Department.

5. A substantial amount of the work under this contract was uncompleted at the time plaintiff ceased its operations November 12, and abandoned the contract December 3, 1934. The Constructing Quartermaster made a detailed inventory

of the uncompleted work and of the material left at the site, which inventory was designated as Addendum No. 2 to the original specifications, and was as follows:

> *Equipment on Hand.*—The following is a list of equipment left on the site by the defaulted contractor which is available for use if desired, *Provided*, that the contractor for completion of the unfinished work accepts full responsibility therefor, and unconditionally agrees to return the same (when the work is completed) in as good condition as when received, due consideration being given to fair wear and tear:
>
> 1—Concrete mixer (1 bag).
> 1—Concrete mixer (½ bag).
> 1—Diaphragm pump (gasoline, single suction).
> 15—Wheelbarrows.
> 7—Ladders (10′ to 20′).
> 1—Gin pole on rollers (rigged with cable winch and sheeves).
> 58—Scaffold Horses (5′ high).
> 32—Steel mortar pans.
> 1—4′ x 8′ Mortar box.
> 15—Scaffold boards.
> 100 ft.—Rubber hose.
> 44—Frames with muslin (For window openings).
> 1—36″ Bolt cutter.
> 4—6″ Wood Blocks (2 single sheeves—2 double sheeves).
> 600 ft.—1″ Hemp rope.

6. Article 9 of the contract provided for its termination if the contractor refused or failed to prosecute the work and also that "If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor."

The surety on plaintiff's performance bond did not elect to complete the work left unfinished by plaintiff when it ceased work November 12, 1934. The Contracting Officer thereupon advertised for proposals for the completion of the work, in accordance with Article 9 of the contract. Pursuant to this advertisement Eastern Construction Co., Inc., of Trenton, New Jersey, submitted its bid February 21, 1935, which, being the lowest, was accepted by defendant. April 11, and April 12, 1935 a contract, based on the orig-

inal contract and specifications, schedules and drawings, and Addenda Nos. 1 and 2, was signed by defendant, represented by Brigadier General P. W. Guiney, as Contracting Officer, and by Eastern Construction Co., Inc., represented by its President, Jos. Paternoster. This contract is of record at page 2 of Defendant's Exhibit 11 and is made a part hereof by reference. Under this contract the Eastern Construction Co., Inc., agreed to furnish all materials for and perform the work of completing plaintiff's contract for the agreed sum of $49,775. The Eastern Construction Co., Inc., executed and furnished to defendant a surety bond for the faithful performance of its contract. April 13, 1935, defendant notified the Eastern Construction Co., Inc., to proceed with its work, which notice to proceed was received April 15, 1935. During the performance of the contract the contract price was increased to $49,912, due to extra work under Change Order A, and the time for completion of the work extended 25 days. All work under this contract was completed and accepted September 12, 1935, as required by the contract.

7. March 19, 1938, after all work called for by plaintiff's contract had been completed by defendant, the Comptroller General on behalf of defendant issued to plaintiff notice of settlement and demand for payment as follows:

> Under the terms of the above contract, John M. Whelan & Sons, Inc., agreed to furnish all labor and materials, and perform all work required for construction and completion of 7 officers' quarters (two type "C" Field, one type "D" Field, one type "C" Company, three double Company Officers' Quarters), including utilities thereto, at Fort Monmouth, New Jersey, in strict accordance with the specifications, schedules, and drawings, all of which were made a part of the contract, for a consideration of $126,195, which amount was increased to $127,750.62 by Change Orders "A" and "B", dated September 28 and November 8, 1934, respectively, the work to be commenced December 28, 1933, and to be completed November 30, 1934 (completion date extended from August 5, 1934).
>
> The records indicate that on or about November 12, 1934, with the work under the contract approximately 75% completed, the contractor ceased operations, and on November 27, 1934, was warned that unless work was immediately resumed, or a written statement of its in-

tentions tendered by December 4, 1934, action would be taken with a view to termination of its right to proceed. No satisfactory reply being received, the contractor was declared in default as of December 4, 1934, and its right to proceed with work under the contract was terminated. As the surety on the contractor's performance bond, the Fireman's Fund Indemnity Company, did not elect to complete whereupon the Constructing Quartermaster, Fort Monmouth, New Jersey, proceeded to invite proposals for the completion of the unfinished work. In response to said invitation five bids were received, of which that submitted by the Eastern Construction Company, Inc., 705 Greenwood Avenue, Trenton, New Jersey, was the lowest, the amount thereof being $49,775. The bid of the Eastern Construction Company, Inc., was accepted and contract No. W-6148-qm-86 entered into on April 12, 1935. Under the latter contract the work was completed at an excess cost to the United States of $21,647.84, as shown by the following statement:

Cost of completion under contract No. W-6148-qm-86, dated April 12, 1935		$49, 775. 00
Debtor's contract price	$127, 750. 62	
Less partial payments for work completed	86, 836. 55	
Unpaid balance of contract at time of default		40, 914. 07
Excess cost of completion over debtor's original contract price		8, 860. 93
Additional expenses incurred due to debtor's default:		
Expended for protection of materials following default		48. 00
Cost of advertising for completion of contract		15. 50
Proportional cost of salaries of Construction Quartermaster's office and inspection personnel		3, 316. 35
Proportional cost of Construction Quartermaster's salary, subsistence and rental allowances		806. 47
Proportional value of rental allowances for officers' quarters		8, 600. 59
Total excess cost to the United States		21, 647. 84
Liquidated damages incurred by the United States: November 30 to December 4, 1934—4 days at $25 per day		100. 00
		21, 747. 84

has been settled and the sum of Twenty-one Thousand Seven Hundred Forty-seven dollars and Eighty-four cents has been found due the United States per above certificate number. The amount due should be remitted to this office promptly, by check, draft, or money order payable to the "United States".

A copy of this certificate of settlement was sent to plaintiff's bondsman, the Fireman's Fund Indemnity Company.

8. Plaintiff's failure to proceed with its work and to complete its contract on or before November 30, 1934, the date provided therein, as extended, for completion, caused the defendant to sustain certain actual damages, in the total amount of $22,525.56, between November 30, 1934, and September 12, 1935, after allowing plaintiff due and proper credit for all unpaid amounts or amounts earned and not paid, as follows:

1. Extra cost to defendant of completing the 7 officers' quarters by contract with Eastern Construction Co., Inc	$8,860.93
2. Rental allowances to Army officers stationed at Fort Monmouth, N. J., between December 4, 1934, when plaintiff defaulted, and September 12, 1935, when the work was finally completed, in the amount of $11,-717.38, of which $9,340.40 represents actual damages incurred because of plaintiff's failure to complete contract on or before December 4, 1934	9,340.40
3. Salaries to Constructing Quartermaster and his employees for additional work performed by them by reason of plaintiff's default, between December 4, 1934, and September 12, 1935	4,160.73
4. Damages accrued between November 30, 1934, completion date under plaintiff's contract, and December 4, 1934, when plaintiff defaulted, calculated at the rate of $25.00 specified in the Liquidated-Damage clause of Article 9 of the contract	100.00
5. Labor to protect materials during period between plaintiff's default and date when Eastern Construction Co., Inc., commenced work	48.00
6. Advertisements for bids for completion of work	15.50
	22,525.56

The actual damages sustained by defendant by reason of the delay from November 30 to December 4, 1934, because of plaintiff's failure to perform any work during that period, were at least equal to the amount of $100 as computed in Item 4 above.

9. In its amended counterclaim for $22,525.56 defendant has duly credited plaintiff with the following amounts which were the correct amounts earned by plaintiff or due it prior to its default but not paid: $6,309.70, retained percentage

on monthly payments; $1,500, liquidated damages erroneously deducted from retained percentages prior to November 30, 1934 (the extended date for completion by plaintiff); and $1,440.77 allowed under the provisions of Change Order A as extra compensation. And in addition to the above items $6,330.37 was credited, representing amounts paid by plaintiff for pay-roll expenses and materials delivered to the site between November 1 and 9, 1934. See items 10, 11, 12 and 13, finding 12. Plaintiff was not sooner reimbursed for the last item because the last progress payment was made for the month ending October 30, 1934. No portion of the net amount of damages of $22,525.56 for which defendant makes counterclaim has been paid by plaintiff or its bondsman.

10. Plaintiff's first claim of $2,105 purports to cover loss of anticipated profit from defendant's alleged breach of contract, as reflected in Exhibit Q attached to the petition. No proof has been tendered by way of books, records, or original estimates on which such alleged anticipated profit could be based, and there is no satisfactory and convincing proof that plaintiff would have made this profit on the remaining unpaid balance of the contract price if plaintiff had not abandoned the work.

11. Plaintiff's next claim of $3,010 represents alleged overhead costs occasioned by the delay between August 5, 1934, the original contract completion date, and November 12, 1934, the date when plaintiff stopped all work. Plaintiff claims that during the period of 14 weeks, at 5 days per week, it sustained a weekly loss of $43.00, covering the daily salaries of John M. Whelan, George Whelan, and Superintendent O'Malley, rental costs, and services of a stenographer. The defendant did not at any time cause plaintiff any delay. An extension of 27 days was allowed, due to severe weather, and a further extension of 90 days because of extra work performed by plaintiff under Change Order A, and paid for at the contract unit prices. Plaintiff's books and records do not disclose any reasonable basis for the computation of this claim, and the proof does not otherwise sustain it in fact.

12. The remainder of plaintiff's claims for compensation for alleged extra work and alleged excess costs and damages because of alleged unreasonable rulings and require-

ments, and balances due, are for convenience set out as follows:

1. Additional foundation costs	$1, 323. 03
2. Extra waterproofing	52. 32
3. Extending foundations for steps	173. 78
4. Changing electric light switch	43. 78
5. Fill in areas around houses "U" and "V"	484. 51
6. Brickwork	7, 507. 39
7. Carpentry and lumber	4, 321. 28
8. Extra plumbing costs	239. 35
9. Additional roofing costs	3, 088. 47
10. Sums wrongfully deducted as liquidated damages	1, 500. 00
11. Sums retained as security from progress payments	6, 309. 70
12. Material delivered in November, 1934	$5, 215. 53
13. Labor costs, November, 1934	1, 319. 86
Total	$31, 579. 00

The details of these claims are shown in Exhibits C to L, inclusive, attached to the petition.

13. *Claim for $1,323.03, additional foundation costs (Item 1).*—This item covers the alleged costs of additional labor and materials required to extend the foundations, in accordance with the Constructing Quartermaster's written order, below the levels originally called for by the contract and specifications, in excess of the amount of $2,819.28 allowed and paid by the contracting officer in Change Order A, September 28, 1934. (Defendant's Exhibit No. 5, page 20.)

Item 19 of plaintiff's original bid and proposal of November 17, 1933, was in part as follows:

> *Unit Prices.*—The Contractor shall submit on the Standard Form of Bid, "Unit Prices" for each item which shall be used as a basis in making deductions from or additions to the contract price, providing any deviation from the drawings and specifications decreases or increases the amount of work indicated and required therein. These prices shall include the furnishing of all labor and material complete in place, except as otherwise noted:
>
> (a) Excavation (earth) Dollars ($.40) per cu. yd.
> (b) Fill, earth, compacted in place Dollars ($.40) per cu. yd.
> (c) Concrete (type "A", including forms) Dollars ($14.00) per cu. yd.
> (d) Concrete (type "B", including forms) Dollars ($15.00) per cu. yd.
> (e) Reinforcing Steel Dollars ($70.00) per ton

Articles 1, 3, 4, and 5 of the contract provided in part as follows:

ARTICLE 1. *Statement of work.*—The contractor shall furnish all labor and materials, and perform all work required for construction and completion of Seven (7) Officers' Quarters, including the utilities thereto at Fort Monmouth, New Jersey, in accordance with Items I, X, XIV, XVII, and XVIII of their bid dated November 17, 1933, and in accordance with unit prices covered by Item XIX of said bid, as listed on a separate sheet and identified as a part of this contract.

* * * * *

The following unit prices are hereby identified as being part of Article I of this contract dated December 4, 1933, between John M. Whelan & Sons, Inc., and the Government: [Here follows the unit prices set forth in item 19 of plaintiff's bid as above quoted.]

ART. 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ART. 4. *Changed conditions.*—Should the contractor encounter, or the Government discover during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indi-

cated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

ART. 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

The specifications provide with respect to excavation in part as follows:

3. *Excavating.*— * * *

Do all excavating of every description and of whatever substances encountered to the dimensions and levels shown on drawings for all foundations, floors, etc.

Excavations for footings of every description shall be carried down to the depth and levels shown on drawings. However, should suitable bearings not be encountered at the levels shown, they shall be carried down to such levels as may be necessary and approved by the C. Q. M.

Care shall be taken not to excavate beyond the depths indicated on drawings, as no backfilling under footings will be permitted; any excess below the levels shown shall be filled with concrete at the expense of the Contractor. The excavations for footings shall be properly leveled off and cleared of all loose earth to the end that footings shall rest on compact, undisturbed bottoms.

Excavate a sufficient distance from walls to allow for inspection and to permit the various trades to perform their work.

All boulders and rocks less than one (1) cubic yard in size and all shale that can be removed with a pick shall be considered as earth excavation.

* * * * *

Authorized increase or decrease in amount of earth or rock excavation shall be paid by or credited to the U. S. as per amount mentioned under "Unit Prices" of bid.

* * * * *

30. *Extension of Foundations, etc.*—Extension of foundations beyond dimensions given on drawings where required by nature of soil, etc., will be paid for as an extra, but the price allowed per cubic yard shall be as stated in "Unit Prices" of bid. If solid foundations are

found at a lesser depth than the dimensions given on the drawings, then a credit shall be given the U. S. based on the "Unit Prices."

The Constructing Quartermaster on December 21, 1933, before excavation work had started and before notice to proceed was given on December 27, requested plaintiff in writing not to excavate by power shovel below the bottom of the basement floor slabs. This letter was as follows:

> In excavating for the basements to the Officers' quarters, it is requested that excavating by shovel shall not extend below the line of the bottom of the floor slab, and immediately upon reaching this level, it is requested that this office be notified, in order that soil tests may be made.
>
> It is extremely important that the shovel not excavate lower than the levels indicated above. Your cooperation in this case will be very much appreciated.

Plaintiff made no protest during the time and as required by the contract and completed the power shovel work to the basement floor slabs. Plaintiff then dug the trench excavations for the narrow footings below the line of the bottom of the basement floor slabs by means of hand labor. This was the customary method, because of the mucky condition of the soil at that time. The size and type of plaintiff's power shovel made it useless for the proper and satisfactory performance of work of this nature. The ruling of the Constructing Quartermaster of December 21 was not unreasonable or arbitrary.

The Constructing Quartermaster, after making test probings at the bottom of the excavations for footings, as originally called for, decided that in order to reach an adequate bearing surface, the footings would have to be extended below the grades shown on the plans. January 19, 1934, the Constructing Quartermaster wrote plaintiff as follows:

> Because of unsatisfactory soil conditions in the sites of certain of the Officers' Quarters, it will be necessary to extend the footings to depths that will insure stable foundations. You are, therefore, directed to perform the necessary excavations and install the additional concrete and reenforcing to accomplish these revisions in the foundations. You will be compensated for this

work in accordance with the unit prices set forth in your contract.

Where necessary, you will install sheet piling and keep excavations and trenches free of water by pumping. When the scope of the sheet piling and pumping in connection with the changes in foundations is determined, it is requested that you furnish this office with your estimated cost thereof. This cost will be checked by this office, and if found reasonable, payment therefor will be allowed you. If, on the other hand, your estimate is not considered reasonable, it will be necessary that an adjustment be made in accordance with the estimates of this office.

Additional time for the performance of your contract will be granted because of these changes in foundations.

Plaintiff proceeded with this additional work and performed the excavation by hand labor. February 1, 1934, plaintiff billed defendant for the extra work completed to that date, at 40 cents per cubic yard for earth excavation, as provided in the unit price set forth in the contract, and payment was made accordingly.

After the above work was completed the quantities of excavation, concrete, reinforcing steel, and the costs thereof, and the costs of sheet piling, pumping, steel I beams and plates and demolition of forms involved were agreed upon by plaintiff and defendant and were carried into Change Order A. The amount of this change order was computed on the basis of the unit prices for earth excavation, concrete, and reinforcing steel as set forth in the contract. Plaintiff made no timely written protest to the Constructing Quartermaster or contracting officer with reference to their decisions as reflected in Change Order A, and took no appeal, as provided in Articles 3 and 15 of the contract, from the amount stated in Change Order A, which appears at pages 20–22 of Defendant's Exhibit 5 and is by reference made a part hereof.

The reasonable actual cost of the additional earth excavation of the 542.60 cubic yards for footings by hand labor was $1.80 per cubic yard.

14. *Claim for $52.32, extra waterproofing (Item 2).*—This item of the claim grows out of the preceding item and

covers purchases of materials necessary for waterproofing the surface of the 99.71 cubic yards of additional concrete installed in the extended footings referred to in the preceding finding, which additional concrete was paid for by defendant at the unit price provided in Article 1 of the contract, of $15 per cubic yard, totaling $1,495.65. The specifications provide as to dampproofing in part as follows:

> 55. *Scope of Work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all dampproofing indicated on drawings or specified.
>
> Dampproofing shall be applied to all interior surfaces of exterior masonry wall above first floor level, and the exterior of foundation walls of excavated basement from footings to 4″ below finished grade.
>
> * * * * *
>
> 57. *Application.*— * * *
>
> Surfaces to receive dampproofing shall be cleaned of all dirt, oil, grease, and other foreign matter.
>
> Dampproofing material shall be applied in two (2) uniform coats in amounts and as recommended by the manufacturer of the material to be used.
>
> Each coat shall entirely cover every portion of wall surface to be dampproofed. Chases, recesses, heads, jambs, and sills in walls where dampproofing is specified, shall be dampproofed. * * *

Plaintiff applied dampproofing to the concrete in question according to the above specifications, but made no protest or claim for extra compensation at the time the work was performed, as it was required to do under Articles 3 and 5 of the contract. In addition to Article 5 of the contract, paragraph 27 of the specifications provided as follows:

> No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M. and the price stated in such order.

15. *Claim for $173.78, extending foundations for steps (Item 3).*—This item represents the cost of extending the foundations for steps leading into the buildings to correspond with the depth to which the foundations for the buildings had been extended, as stated in finding 13. This claim is duplicated under brickwork which will be referred to hereinafter.

Plaintiff made no protest or claim for extra compensation for this work either at the time it was performed or at any time thereafter as required by Articles 3 and 5 of the contract. The amount of this claimed extra cost is not sustained by any satisfactory proof.

16. *Claim for $43.78, cost of changing electric light switch (Item 4).*—After a light switch had been installed in house "U" the Constructing Quartermaster requested plaintiff to change its location, which it did. To compensate plaintiff for the cost of this extra work the Constructing Quartermaster directed plaintiff to omit the installation of certain electrical work in houses "K," "N," and "W," which under the contract he had a right to do. This arrangement was accepted by plaintiff as an adjustment of the cost of this item. Plaintiff made no protest to the Constructing Quartermaster or contracting officer as provided by Articles 3 and 5 of the contract. The claim for extra lumber and carpentry in this item is duplicated under Item 7, Carpentry and Lumber, to be hereinafter considered.

17. *Claim for $484.51, cost of labor and material for ramps and platforms to and at first floor level of houses "U" and "V" (Item 5).*—Houses "U" and "V" were constructed on ground which was at a lower elevation than that upon which the other houses involved in this contract were built. Plaintiff's contract provided that these two houses should be built on concrete foundations extending above the original ground level, in order that all the houses when completed would be at the same finished grade, and the specifications, page 7b as an addition to paragraph 5, page 9, called for the placing by the successful bidder of "10,000 cubic yards of fill to bring ground to required grades and to form terraces as directed by the C. Q. M. In general the completed embankments shall conform to the existing terraces. Fill for this purpose may be secured without charge from a borrow pit on the reservation. Fill shall be compacted in layers 12″ thick and shall be brought to the required grades as directed."

Item XVII of the defendant's invitation for bids required each bidder to state the amount that he would agree "To deduct from the amount of Item I of this bid for omitting the ten thousand (10,000) cubic yards of additional fill as

specified under 'Special Conditions' S. C. 7—Page 7b." Plaintiff proposed a reduction of $4,000 in its main bid for the elimination of the 10,000 cubic yards of fill around houses "U" and "V" for the purpose of bringing up the finished grade to that of the surrounding ground and existing terraces. This particular fill of 10,000 cubic yards was eliminated when plaintiff's bid was accepted and the contract made, and this work was later performed by a separate contractor on bids called for by defendant September 26, 1934. However, paragraphs 4 and 5, pages 8 and 9 of the specifications remained and became a part of plaintiff's contract and were not affected by the elimination of the 10,000 cubic yards of fill specified in Addendum No. 1, page 7b. Paragraphs 4 and 5 are as follows:

> 4. *Backfilling.*—When directed by the C. Q. M., all trenches and excavated portions against walls, etc., unless otherwise specified, shall be filled with earth in 1′ horizontal layers, well puddled, tamped and brought up to the required grades.
>
> Backfilling on footing drains shall be of porous material approved by the C. Q. M. Backfill shall slope to drain from building.
>
> 5. *Grading.*—Excavated material shall be spread around the building as required by the C. Q. M. Rock shall be deposited as and where directed by the C. Q. M. Any excess of excavated material not needed for backfilling or grading shall be placed where directed by the C. Q. M. Furnishing finished top soil and spreading of same will not be required under this contract. The ground within the building shall be graded as indicated on drawings.

When constructing these two houses "U" and "V," plaintiff did not backfill the trenches and excavated portions around the finished foundation walls. For this reason and for the reason that defendant had not let a separate contract for the 10,000 cubic yards of fill at the time plaintiff finished the foundation walls of buildings "U" and "V," it was necessary for plaintiff to build runways from the existing ground level to the first floor level of these buildings and platforms or scaffolds at that level for the satisfactory hauling and storing of needed materials at the first floor level for work to be constructed on top of the foundation walls. The Construct-

ing Quartermaster did not at any time promise or agree with plaintiff, either orally or in writing, that earth fill to the top of the foundation walls would be placed by defendant around any of the houses as soon as the foundation walls were completed by plaintiff, nor did the contract or specifications include such a provision.

Plaintiff expended $484.51 for necessary labor and materials to build runways and platforms and the hauling of necessary building materials to first-floor level of houses "U" and "V" in order properly to perform the work called for by its contract in the construction of these buildings. Defendant did not order or direct plaintiff to construct and use these runways and platforms. Their construction was not extra work under the contract and specifications.

Plaintiff made no written protest or claim for compensation for the cost of building runways and platforms and elevating materials either at the time the work was performed or at any time thereafter.

18. *Claim for $7,507.39, alleged extra expense of performing brickwork (Item 6).*—

Article 6 (c) of the contract provided:

> (c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

Paragraph 8, page 3 of the specifications, provided that "The work shall be executed in the best and most workmanlike manner, in strict accordance with the drawings and specifications, by qualified, careful, and efficient mechanics."

Paragraph 10 provide as follows:

> *Interpretation of Contract.*—Unless otherwise specifically set forth, the contractor shall furnish all materials, labor, etc., necessary to fully complete the work according to the true intent and meaning of the drawings and specifications, of which intent and meaning the C. Q. M. shall be the interpreter. Except when otherwise indicated, no local terms or classifications will be considered in the interpretation of the contract or the specifications forming a part thereof.

The specifications relating to brickwork provided that "Interior surfaces of all exterior brick walls above the level of the first-floor joists shall be pargeted (plastered) with brick mortar not less than ¾″ thick. All pargeting shall be applied in a thorough manner to meet the approval of the C. Q. M." Buildings erected at or near the site of this work must weather severe driving storms, because of which all joints in brick buildings, as specified in this case, are required to be thoroughly filled with mortar to prevent leakage of water. Plaintiff's contract provided for the construction of exterior walls of 4″ face brick backed up with 8″ of common brick. Paragraph 42, page 7d of the specifications, provided in part as follows:

> The contractor shall furnish alternate for using brick and tile walls instead of solid brick walls shown on drawings. (See bid form.)
>
> If brick and tile wall are used the *tile* shall conform to U. S. Army Specifications No. 81–49, Class "M" medium of interlocking type with deeply scored surfaces except where tile is exposed to view where surfaces shall be smooth.

Before brickwork had started on this job plaintiff proposed to construct the walls of "speedabacker" tile and brick, in lieu of the solid wall of 8″ common brick, with no change in the contract price. Defendant in accepting this propocal stated:

> Reference is made to your memorandum No. 54 relative to your proposal to install "Speedabacker" tile in back of 4″ brick facing in lieu of 13″ solid brick walls.
>
> The proposed change from solid brick walls to construction with 4″ brick facing and 8″ "Speedabacker"

tile for the remainder of the wall is approved. In this construction, walls shall be built by laying five stretcher courses of face brick, then pargeting in back of these courses with mortar, after which the "Speedabacker" tile is put in place and butted against the wet pargeting. Care must be taken to have open joints at the back of the headers, and at the ends of the horizontal webs, in the center of tile, between the two vertical webs. In other words, there will be no through-mortar joints. Particular attention must be taken to see that all vertical and horizontal joints required to be filled, be thoroughly slushed. The three-cell tile with standard heavy scoring will be required for this work.

The ¾″ pargeting covered on page 7–c of Special Conditions must be installed as specified on all interior surfaces.

It is understood that there will be no additional cost to the Government for this change.

Plaintiff continued to do the brickwork in accordance with the above-quoted specifications and consent change order and made no protest regarding same.

As to the brickwork and samples of brick the specifications provided in part:

Samples, etc.—In addition to samples submitted as part of bid, if any, and when required by the C. Q. M., the contractor shall furnish him in advance with samples of the material he proposes to use on the work, and samples so furnished, must, after having been approved, be adhered to. Samples of cement, lime, plaster, and similar materials shall be taken from material delivered on the ground for use, and such materials must be delivered at least ten days before they are required for use. The contractor will be held responsible for all delays caused by rejection by the C. Q. M. of materials of any kind which are found unfit for use or do not conform to samples furnished.

* * * * *

44. *Laying Brick.*—Brickwork shall be built plumb to lines, laid in full beds of mortar with shoved joints and with cross joints slushed solidly and thoroughly flushed with mortar in each course.

Brick walls shall be laid with whole headers every sixth course, unless otherwise shown or specified.

Face of brick shall be kept free from mortar, dirt or stains. The bond of all face brick shall be maintained

plumb and shall be laid out and adjusted so that it will be continuous throughout the plain wall surfaces and so that no course shall terminate at a corner or an opening with a piece less than one-half brick in size. * * *

Pargeting.—Interior surfaces of all exterior brick walls above the level of the first floor joists shall be pargeted (plastered) with brick mortar not less than ¾″ thick. All pargeting shall be applied in a thorough manner to meet the approval of the C. Q. M.

Plaintiff furnished defendant with samples of the brick to be used and built a sample wall for the inspection of the Constructing Quartermaster, who approved the brick subject to conformity with the samples submitted. Defendant's inspector, prior to the laying of the brick, rejected brick which did not conform to the samples. No brickwork or brick walls were torn out by order of the Constructing Quartermaster or defendant's inspector for the purpose of permitting plaintiff to replace brick which was "off-color."

The face brick used by plaintiff carried the manufacturer's trade-mark, the same being impressed into one side of the brick. At the beginning of the brickwork the Constructing Quartermaster orally instructed plaintiff to lay the brick with this index up, for the purpose of insuring that the hollow in the brick, or the scored side thereof, would be thoroughly filled with mortar. This method of laying the brick did not materially increase plaintiff's costs. Neither the Constructing Quartermaster nor any of defendant's inspectors on the work required plaintiff to tear out any brick walls in order that they might satisfy themselves that the brick was being laid with the impression up.

Regarding the use of mortar the specifications provided:

21. *Retempering.*—The retempering of concrete or mortar which has been allowed to stand longer than thirty minutes, that is, remixing with or without additional cement, aggregate, or water, will not be permitted.

42. *Material.*—* * *

Mortar for Brickwork shall be composed of one (1) part of Portland cement to one (1) part of hydrated lime and six (6) parts of sand.

It is customary on all construction work that some mortar which has attained its initial set be thrown away, as it can-

not be used on the work. The amount of mortar wasted on this job was not unreasonable or in excess of the normal amount, nor was any mortar condemned other than as provided for in the specifications.

After part of the brickwork had been completed defendant proposed a change in the mortar material, which, however, did not alter the proportion of the 1–1–6 mix as specified. Plaintiff agreed in writing to make this change without additional cost to defendant. No written order as to laying of brick was made, and plaintiff did not protest or ask for written instructions. Plaintiff made no written protest or claim for extra compensation therefor, as required by Articles 3 and 5 of its contract, either at the time the brickwork was performed or at any time thereafter. Nor did it protest against the method of pargeting, selection of brick, laying of brick with the impression up, manner of inspection, or waste of useless mortar. Plaintiff subcontracted the brick and tile work called for by its contract with defendant for $20,000 and agreed with its subcontractor to advance sums sufficient to meet the subcontractor's pay rolls and to guarantee the payment for all materials purchased for the work by the subcontractor, all such payments by plaintiff for labor and materials to be charged against the subcontract price of $20,000. The actual cost of all brick and tile work called for by plaintiff's contract with defendant, when completed, was $27,905.90, which included the cost of all labor, materials, and compensation and public liability insurance. This total cost was $7,905.90 in excess of plaintiff's subcontract price with the Unit Construction Company. There is no convincing proof that any of this excess cost over the subcontract price was due to any unauthorized, unwarranted, or unreasonable acts, decisions, or requirements of the contracting officer or any of the other representatives of the defendant.

There was not at any time during the prosecution by plaintiff of the work called for and required by its contract and specifications any unwarranted or unreasonable interference with plaintiff's work by the Constructing Quartermaster or any of defendant's inspectors, and defendant did not at any time delay plaintiff in the proper prosecution of

the work. The instructions and requirements of the Constructing Quartermaster in all matters concerning the brickwork were not arbitrary or unreasonable.

19. *Claim for $4, 321.28, alleged unnecessary cost of carpentry and lumber (Item 7).*—Article 6 of the contract provided that all materials to be incorporated in the buildings should be subject to inspection, examination, and test by defendant's inspectors at all times during construction and that defendant should have the right to reject defective material or require its correction, and that any rejected material should be satisfactorily replaced without charge therefor—subject, of course, to the right of the contractor to make protest and claim under Articles 5 and 15 of the contract.

Paragraphs 27 and 28 of the General Conditions of the specifications provided as follows:

> 27. *Extras.*—No charge for any extra work or material will be allowed unless the same has been ordered in writing by the C. Q. M., and the price stated in such order.
>
> 28. *Inspection and Acceptance—or Rejection of work.*—The contractor must understand that the materials delivered and labor furnished by him at any and all times during the progress of the work and prior to final acceptance of and payment for same shall be subject to the inspection of the C. Q. M., or other authorized agent of the U. S., with the full right to accept or reject any part thereof; and that he must, at his own expense, within a reasonable time, remedy any defective or unsatisfactory materials or work; and that in event of his failure to do so, after notice, the C. Q. M. shall have the full right to have the same done and to deduct the cost thereof from any money due the contractor. All condemned materials must be at once removed from the reservation.

The specifications, under the heading "Carpentry," provided in paragraphs 106 and 107 as follows:

> 106. *Scope of work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all carpentry work shown on the drawings or specified. * * *

107. *Material* for framing and finishing shall be approved by the C. Q. M. and conform to the following specifications: [Addendum, 1, page 7g]

Framing Lumber -- No. 1 Common Southern Yellow Pine or

Furring Strips -- No. 1 Common Douglas Fir or No. 1 Common Spruce

* * * * *

NOTE.—Each piece of Framing Lumber, Rough Boarding, etc., shall be "Grade Marked" by the association under which it is graded or each shipment shall be accompanied by a "Certificate of Grading" issued by said association.

Plaintiff's first shipment of No. 1 Common lumber to the site was not grade marked as No. 1 Common, nor was a "Certificate of Grading" furnished by plaintiff as called for by the specifications. Defendant's Constructing Quartermaster at the site first decided that this shipment of lumber was not No. 1 Common and concluded to reject it. A conference was then held between representatives of plaintiff and defendant, whereupon the Constructing Quartermaster had the lumber as a whole further inspected and concluded that the lumber as a whole, although not grade marked, barely came within the requirements of the specifications and accepted it. Thereafter plaintiff furnished No. 1 Common grade marked and certified in accordance with the specifications.

During the progress of the carpentry work defendant's inspectors, with the approval of the Constructing Quartermaster, decided that certain pieces of lumber being used by plaintiff out of the large supply of lumber on hand for incorporation in the buildings were defective by reason of containing too many knots, or for other reasons, and instructed and required plaintiff, in framing and rafter work, to "double up" pieces which it considered defective or of insufficient strength for the purpose for which such pieces were being used. These instructions and requirements were customary and were reasonable in the circumstances. The practice followed was less expensive to plaintiff than would have been the case had pieces of lumber found to be defective been rejected and required to be discarded.

In the carpentry trade and lumber business the term "doubling up" means the placing and spiking of a like piece of lumber to the weak or defective piece. This method of construction is cheaper than to remove the defective piece and substitute therefor a sound joist or rafter, and is good construction practice. Plaintiff at times "doubled up" floor joists and rafters where the particular joist or rafter first installed or intended to be installed appeared defective in the opinion of the defendant. During the prosecution of the work defendant's authorized officers did not reject or require plaintiff to "double up" or "splice" any pieces of lumber that were not defective. It is not unusual to find some weak or defective pieces in large quantities of graded lumber.

Plaintiff had planned to use 20 penny nails when doubling up certain rafters. Inasmuch as these nails would protrude through the wood, defendant's inspector requested plaintiff to clinch such nails. Rather than clinch the nails, plaintiff used 16 penny nails, which, being shorter, did not so protrude. No nails were actually clinched by the carpenters.

Plaintiff performed the carpentry work as instructed. It did not ask for written orders and it made no claim to the Constructing Quartermaster or contracting officer for extra compensation either at the time the carpentry work was being performed or at any time thereafter. Plaintiff made no protest to the Constructing Quartermaster or contracting officer against the method of doubling up of certain pieces of lumber or as to the inspector's request regarding the clinching of any nails that might protrude through the rafters. Plaintiff's present claim for increased costs of lumber and carpentry was computed from estimates only, made long after the work had been done. There was no unreasonable interference by defendant's representatives with plaintiff's carpentry work, in connection with which work this item of the claim arises.

20. *Claim for $239.35, alleged extra plumbing costs* (*Item 8*).—This item of the total claim arises from certain alleged extra costs in connection with certain interior soil pipes and raising the location of water and soil drain pipe outlet sleeve in concrete foundation wall of buildings "U" and "V," after

such outlet sleeve and pipes, including vent pipe, had been installed in the completed foundation basement wall. The work of determining the elevation or grade for and laying of outside "Water, Gas, Sewers, and Drains" was not included in plaintiff's contract, but all interior plumbing, including water and soil pipes complete through foundation walls for outside connection, was included in the contract. Such work was performed.

The specifications, relating to plumbing, provided in paragraph P-9, page P-2, as follows:

> *General Directions.*—The plumbing work shall be performed in harmony with the other work on the building and at such times as directed by the C. Q. M. The general contractor will do all necessary cutting of structural work required for the plumbing, subject to the approval of the C. Q. M.
>
> The plans show the arrangement of all piping. Should local conditions necessitate a rearrangement of same, or if the piping can be run to better advantages, then the contractor before proceeding with the work shall prepare and submit drawings of the proposed rearrangement to the C. Q. M. for the approval of The Q. M. G.

Paragraph P-15, relating to soil, waste, drain, and vent piping, provided, so far as here material, that "The house drain indicated on basement plan is diagrammatic only. The point of discharge and the invert elevation of house drain shall be as directed by the C. Q. M. without additional cost to the Government."

Paragraph P-29 of the specifications provided as follows:

> *Sleeves.*—Sleeves for pipes passing through floors, walls, or partitions shall conform to Specification No. 83-6, section 16, page 8. This contractor shall furnish and locate all sleeves for insertion into structural parts of the building. The joint between sleeves and pipe passing through floor shall be made watertight with plastic material.

When plaintiff was ready to construct the concrete foundation or basement walls of double buildings "U" and "V," its authorized representative asked defendant's representative Henderson, an assistant of the Constructing Quartermaster, for the location and elevation for the necessary sleeve for

outlet water and soil pipes through the concrete wall. Defendant's officers Henderson and Crawford discussed the elevation and grade of the outside sewer lines which were to be subsequently installed by defendant and thereafter gave plaintiff the location and elevation of the necessary outlet sleeves. The matter was not discussed by plaintiff with the Constructing Quartermaster. Plaintiff proceeded to construct the walls and inserted and built in the necessary sleeves as directed. After this work had been completed and the necessary pipes, including vent pipe, had been installed, Henderson decided that the grade for the outside sewer line would not be sufficient when such line was connected with the outlet pipes as located and built in the foundation wall by plaintiff. He thereupon orally instructed and ordered plaintiff to remove the outlet pipes and sleeves and raise the elevation thereof in the foundation wall. In order to do this, it was necessary for plaintiff to disconnect and remove the pipes, to prop up the vent pipe, to cut out the concrete wall around the sleeves, and cut out sufficient of the concrete wall so as to replace the sleeves and outlet pipes at a higher elevation as directed, and to replace the concrete removed.

Plaintiff did not protest to the Constructing Quartermaster or the contracting officer, or ask for written instructions, or make claim to the Constructing Quartermaster or contracting officer for extra work during the progress of this work or thereafter. The only protest made by plaintiff in connection with the matter was an oral statement by plaintiff's president to Henderson that "this is going to be charged to you fellows."

Plaintiff did not keep an account of the cost of labor and materials necessary to remove, raise, and replace the sleeves and pipes, but the reasonable and actual cost of such work was at least $220.

During the construction of several buildings plaintiff laid water and drain pipes in the basements thereof under the supervision and approval of defendant's inspectors. Before final acceptance of this work quantities of dirt, ice, and soil had collected around these pipes. Defendant's inspector instructed plaintiff to dig out this dirt, ice, and other material from around the pipes and to pump out the water that had

collected in the trenches for final inspection. This plaintiff did without protest at a cost of not less than $19.35. Plaintiff did not protest these instructions to the Constructing Quartermaster or the contracting officer or ask for written instructions or make claim for the cost of the work as an extra. The instructions and requirements of the inspector were not arbitrary or unreasonable.

21. *Claim for $3,088.47, alleged additional unnecessary roofing costs (Item 9).*—The specifications provide as to roofing in part as follows:

> 75. *Scope of Work.*—The work under this heading consists of furnishing all material and equipment and performing all necessary labor to do all roofing and sheet-metal work indicated on the drawings or specified.
>
> 78. *Preparation for Roofing.*—* * *
>
> All the above work shall be complete before proceeding with the roofing.
>
> All roofing, sheet-metal work, etc., erected under this heading shall be installed so as to obtain an absolute watertight job.
>
> 81. *Installation of Copper Roof.*—* * *
>
> Roof decks shall be covered with standard size copper roofing sheets laid with flat or standing seams as shown. Seams shall be single locked and soaked with solder or double locked and malleted flat or interlocked standing where indicated. Seams shall overlap in direction of flow. Edges of sheets to be soldered shall be tinned 1½″ on both sides.
>
> All sheets over 12″ wide shall be fastened with copper cleats 1½″ wide by about 3″ long, spaced not over 12″ apart and secured to the roof sheeting by two (2) nails set about ¾″ from the ends and shall have the ends turned back ½″ over the nail heads. The free end of the cleat shall be locked into the seam. Where seams are soldered, the cleats shall be tinned.

Plaintiff was required by the Constructing Quartermaster to cover the decks of flat roofs with "standard size copper roofing sheets" of approximately 14″ x 20″ in diameter. "Standard size copper roofing sheets" is a term which has one construction by its manufacturers and a different one by the copper-roofing construction trade. Recognized standard handbooks consulted by both sheet-metal workers and

architects define "standard size roofing sheets" as the approximate dimensions of those defendant required plaintiff to use on this job. Manufacturers sell copper sheeting in standard stock sizes ranging from 20" to 36" in width by 96" in length. When applying this sheeting for flat roofs as in the instant case, it is an accepted practice to cut the manufacturer's stock size sheets to standard size roofing sheets of the approximate dimensions of 12" x 20". Plaintiff made no written protest to the Constructing Quartermaster or the contracting officer either during the time the slate and copper roofing was being installed or thereafter, nor did it ask for a written order or make a claim for extra compensation for the work as an extra under Articles 3 and 5 of its contract, and paragraph 27 of the specifications. Plaintiff kept no account of the extra costs of cutting and placing this roofing as instructed by the Constructing Quartermaster. The requirements and instructions of the Constructing Quartermaster with reference to roofing were not arbitrary or unreasonable. There was no unwarranted or unreasonable interference by the Constructing Quartermaster or other officers with plaintiff's employes or subcontractors in connection with the roofing work under plaintiff's contract. Plaintiff could have laid the roofing on the buildings constructed in sheets 20" to 36" x 96" more rapidly and at less expense than the time required and the cost of cutting and placing the same in accordance with the instructions of the Constructing Quartermaster. The reasonable difference in such costs did not exceed $1,500.

22. Plaintiff did not make written appeal to the head of the department concerned in reference to any record, ruling, decision, or dispute with respect to any of the items sued on in this action.

23. On many occasions during the prosecution of the work called for by plaintiff's contract the Constructing Quartermaster in the reasonable and proper discharge of his duties disagreed with plaintiff and its representatives, but there is no foundation or support in the record for plaintiff's allegations of arbitrary and unreasonable conduct on the part of the Constructing Quartermaster.

The court decided that the plaintiff was not entitled to recover and that the defendant was entitled to recover on its counterclaim.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff claims that the defendant, through the actions, rulings, and requirements of its Quartermaster and the action of the contracting officer in terminating the contract, breached the contract by unreasonable, arbitrary, grossly erroneous, and unauthorized rulings and requirements which plaintiff alleges caused it extra costs and damages in the amount of $22,348.91. This amount added to the amount of $15,580.84 due plaintiff under the contract at the time it ceased work thereunder on November 12, 1934, and for which the defendant has given plaintiff credit in its counterclaim for $22,525.56, totals $37,929.75.

Plaintiff's bid for construction of the seven buildings for Army Officers' Quarters at Fort Monmouth, New Jersey, under and in accordance with certain specifications and the provisions of the standard form of contract for such construction, upon the basis of which the bid was submitted, was accepted by the defendant November 27, 1933, and the contract, embodying the specifications as a part thereof, was executed December 4, 1933. The contract price was $126,195. In its bid plaintiff proposed to commence work within ten days after receipt of notice to proceed and to complete the same within 220 calendar days thereafter. The contract, when executed, specifically provided that plaintiff was to commence the work December 28, 1933, and complete the same August 5, 1934. As set forth in finding 1, the period for completion was extended a total of 117 days, or to November 30, 1934. Due to unusually severe weather, an extra work order and under two change orders, A and B, the contract price was increased to $127,750.62. Plaintiff did not complete the work called for by the contract but ceased the work thereunder on November 12, 1934, and by letter dated December 3, 1934, received by the defendant on the following day, notified the defendant that it had abandoned and given up the contract, and that it was refusing to

proceed further thereunder on the asserted ground that the defendant had breached the contract by letter to plaintiff from the contracting officer on November 14, 1934, "as well as other breaches, changes, and extra work."

The facts established by the record with reference to plaintiff's failure and refusal to proceed with the work and the termination by the contracting officer of the contract in accordance with the provisions thereof, are set forth in findings 3 to 6, inclusive. Under these findings it is clear that the defendant did not breach the contract with reference to its wage rulings under Arts. 15, 18, and 22 of the contract (finding 3) or in terminating the contract under Art. 9 by reason of the failure and refusal of the plaintiff to proceed with the work as requested. On the contrary, it seems clear that plaintiff breached the contract by reason of its failure and refusal, as found by the Constructing Quartermaster and the contracting officer, to comply with the wage provisions of Arts. 18 and 22 of the contract. The decision of the contracting officer was not arbitrary or unreasonable. Plaintiff did not appeal to the head of the department under Art. 15 of the contract and no official of the defendant in any way interfered with or impeded plaintiff in its right to do so.

After plaintiff had abandoned the work and its right to proceed further under the contract had been terminated by the contracting officer, as of December 4, 1934, the defendant readvertised for proposals for completion of the work under the contract after plaintiff's surety had elected not to complete the contract. Another contract for the incompleted portion of the work was made, and such work was completed on September 12, 1935, at a cost of $49,912, or $8,860.93 in excess of plaintiff's amended contract price. The defendant proceeded with all reasonable and proper dispatch under the circumstances in completing the work called for by plaintiff's contract, but the same was not completed until 286 days after November 30, 1934, the date proposed by plaintiff and as provided in its contract as extended. By reason of plaintiff's breach of the contract and its failure and refusal to proceed with and complete the work called

for thereby, the defendant sustained actual excess costs and damages, after allowing plaintiff credit for all sums due it under the contract at the time it ceased work thereunder, in the net amount of $22,525.56, as set forth in findings 6, 8, and 9. For this excess cost of completion and the actual damages for delay, the defendant is entitled to judgment on its counterclaim for $22,525.56.

The remaining items of plaintiff's claims for alleged extra work and damages are set forth in findings 10, 11, and 12, and the facts and circumstances with reference to each of the eleven separate items are set forth in detail in findings 10, 11, 13–21, inclusive. It is not necessary to discuss the facts in detail here. It is sufficient to say that plaintiff's proof fails to establish that the defendant's Constructing Quartermaster acted unreasonably, arbitrarily, or capriciously in any instance or that any of his instructions, rulings, or requirements were grossly erroneous or exceeded his authority under the contract and specifications. Plaintiff did not protest the instructions, rulings, and decisions of the Constructing Quartermaster to the contracting officer under the applicable provisions of the contract and specifications (Arts. 3, 4, and 15) and plaintiff did not in any instance appeal to the head of the department, as provided in Art. 15, with reference to any action, ruling, or decision of the Constructing Quartermaster or the contracting officer. (See findings 22 and 23.) No officer of defendant obstructed or hindered plaintiff in any instance or in any way in the matter of protests or appeals.

Upon the facts set forth in findings 10, 11, and 13–23, inclusive, and for the reasons above stated, plaintiff is not entitled to recover on any of the items of its claim. Plaintiff's petition is therefore dismissed and judgment is rendered in favor of the defendant on its amended counterclaim for $22,525.56. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAM W. McGREGOR v. THE UNITED STATES

No. 43693

PERRY SHILTON v. THE UNITED STATES

No. 43695

LOUIE HESS v. THE UNITED STATES

No. 43664

JACK WADE v. THE UNITED STATES

No. 43665

OWEN BUSCH v. THE UNITED STATES

No. 43666

[Decided December 7, 1942, Plaintiffs' motions for new trial overruled March 1, 1943] *

On the Proofs

Personal injury; evidence held not establishing negligence on the part of defendant's agent.—Under the provisions of the special act (50 Stat. 1052) conferring jurisdiction upon the Court of Claims it is *held* that in a collision between motor car occupied by the plaintiffs and truck belonging to the Government the evidence does not sustain the claim for damages for personal injuries alleged to have been due to negligence of the truck driver.

Same; negligence.—Where one party's negligence has placed the other party in a position of peril, said second party is not responsible for taking a course of action which in the surrounding facts and circumstances at the time appeared to be a reasonable and prudent thing to do, although it turned out that it was the wrong thing to have done. *Omaha Water Co.* v. *Schamel*, 147 Fed. 502, and other cases cited.

Same; contributory negligence.—The driver of plaintiffs' car, who is one of the plaintiffs, was at least guilty of contributory negligence.

The Reporter's statement of the case:

Mr. William E. Leahy for plaintiffs. *Miss M. Pearl McCall* and *Mr. Eugene B. Sullivan* were on the briefs.

Mr. Elihu Schott, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

*Petition for writ of certiorari pending.

The parties have agreed that the evidence taken in any one of the above-styled cases might be used and considered in the others. The cases were argued together. The facts applicable to one are applicable to all, except as to the extent of the damage, if any, suffered by each of the plaintiffs. Accordingly, for the purposes of the findings of fact and opinion, the cases are hereby consolidated.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. On August 14, 1937, the following Act of Congress (50 Stat. 1052) was approved:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the United States Court of Claims to hear, determine, and render judgment, as if the United States were suable in tort, upon the claims of Jack Wade, Perry Shilton, Louie Hess, Owen Busch, and William W. McGregor, all of Mancos, Colorado, for damages resulting from personal injuries sustained by them in a collision with a Civilian Conservation Corps truck on the public highway on the crest of Navajo Hill, in Mesa Verde National Park, Colorado, on January 7, 1935: *Provided*, That such notice of the suit shall be given to the Attorney General of the United States as may be provided by order of the said court: *Provided further*, That said suit shall be brought and commenced within six months of the date of the passage of this Act.

2. The collision referred to in the Act occurred on a road leading from Mesa Verde National Park to Mancos, Colorado, at a point 125 feet south of a telephone box on the west side of the road. This telephone box was about 700 or 800 feet south of the crest of Navajo Hill and at the south end of an eight per cent eastward curve in the road; the road ran substantially north and south. There were bushes on each side of the road, but the curve in the road was so slight that one traveling the highway on or approaching the curve could see along the highway for a distance of not less than 500 feet. The accident happened at 5:15 in the afternoon when the visibility was good.

There was a slight grade in the road toward the north.

The paved portion of the highway was 20 feet wide, referred to in the testimony as the oil mat, and on each side there was a two-foot shoulder of earth or gravel. No line marked the center of the road.

At and approaching the point of the collision from the north, there was a ditch about two feet deep on the west side of the road; on the east of the road the ground was level and unobstructed for about a car's length from the shoulder, so that a car might have run completely off the east side of the highway its full length with comparative safety.

3. Both vehicles were traveling about twenty miles per hour.

4. All the plaintiffs were occupants of a 1931 Oldsmobile coach, owned and operated by plaintiff McGregor. In addition to the plaintiffs, there were two other persons in the car. The driver and two other persons were on the front seat and there were four persons in the rear seat, one of whom at the time of the accident was sitting in the lap of another. The car was traveling from the park toward Mancos, Colorado, in a northwardly direction.

The truck with which plaintiffs' car collided was a 1½-ton Chevrolet truck, the property of the Civilian Conservation Corps, operated at the time by an employee of the defendant by the name of Carpenter in the scope of his employment. It was returning to the Park from Mancos, Colorado, where it had gone to get some supplies for the CCC camp in the Park. It had on it a load of about 3,500 pounds. It was traveling in a southerly direction. With the driver in the cab of the truck was another of defendant's employees.

5. When the vehicles were within from 350 to 400 feet of one another the truck was traveling on its right side of the road, which was the west side, and the car was traveling on its wrong side, or the west side. When within 350 to 400 feet of plaintiffs' car the driver of the truck saw it on the wrong side of the road and blew his horn in warning two or three times. Plaintiffs, however, continued on their wrong side of the road, and defendant's driver applied his brakes. When plaintiffs continued to come toward the truck and a collision seemed imminent, the driver of the truck cut it

toward the vacant part of the highway, which was the east side of the road, the truck's wrong side. There was a ditch on the west side of the road which prevented the truck driver from cutting the truck toward his right. At the same time the driver of plaintiffs' car, for the first time observing the truck, also cut to this side of the road, which was their right side, resulting in a collision between the two vehicles.

6. The cars collided two or three feet to the east of the center of the road. The car was knocked back toward the southeast two or three feet. After it came to rest its right front wheel was 18 inches to the east of the paved portion of the road and on the shoulder. The left front wheel of the truck after the accident was two or three feet east of the center of the road. There was a space of two or three feet between the truck and the car. The rear of the truck completely blocked the passage of traffic on the west side of the road, and the car completely blocked it on the east.

7. The truck struck the car partly on the left front fender and partly on the left and front of the radiator.

After the accident the car was at an angle of about 45 degrees to the center of the road, and the truck at an angle of about 30 degrees.

8. The driver of the truck was free of negligence that proximately contributed to the accident.

9. Plaintiff McGregor, the driver of the car, did not see the truck until he was within 25 feet of it. He was not keeping a lookout ahead, but was looking to the right of the road. Immediately before the accident and for sometime prior thereto he was traveling on the west side of the road, which was his wrong side. He took no steps to avoid the accident until just an instant before the collision, when he cut his car sharply to the right of the road. He was guilty of negligence which proximately contributed to the accident, in that he was driving on his wrong side of the road and was not keeping a lookout ahead and took no steps to avoid the collision until too late to avoid it.

10. All the occupants of plaintiff's car were employees in the Mesa Verde National Park. They lived in Mancos, Colorado, and regularly traveled to and from the Park in plaintiff McGregor's car. Each person, whether driver or occu-

pant, shared the expenses of the operation of the car to and from the Park.

11. As a result of the accident each of the plaintiffs suffered damage in varying amounts, but no finding on the amount thereof is made since the court is of opinion that the defendant is not liable to the plaintiffs therefor.

The court decided that the plaintiffs were not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Under the authority of a special Act of Congress (50 Stat. 1052), the plaintiffs in these five cases sue for damages for personal injuries alleged to have been sustained as a result of a collision between the defendant's truck and an automobile driven by the plaintiff William W. McGregor, in which the other plaintiffs were passengers.

The collision happened on the road from the Mesa Verde National Park to Mancos, Colorado. The plaintiffs were traveling north-east on their way from the park to Mancos. Defendant's truck was traveling south-west on the way to the park from Mancos.

McGregor, the driver of the car, says he saw the truck when it was about 300 feet away, that it was on the wrong side of the road, but that he continued on in his course on his right side, assuming the truck would pull over to its right side before the collision, but that it did not, and they ran together. None of the passengers in McGregor's car saw the truck until just an instant before the collision, but they support McGregor's testimony so far as they can.

The driver of the truck says that he was on his right side of the road, and that the plaintiffs were on their wrong side, that he blew his horn at them and that, when they did not heed this, he put on his brakes, but when plaintiff continued on toward him and a collision was imminent, he cut the truck over to his wrong side of the road in order to pass plaintiffs on their right, and that plaintiffs at the same instant cut their car over to their right side of the road, as a result of all of which the two cars ran together. In this he is supported by the other occupant of the truck, a man named Durrett.

The plaintiffs' testimony is not convincing. None of them, except the driver, saw the truck until it was within 15 to 25 feet of them, just a second before the crash, and some of them did not see it at all before the crash. They are not in position, therefore, to testify to its position on the road. They are in no better position to testify to their own position on the road, because all of them say they were looking out to the right of the road, either at the time of the crash or just an instant before, except one man who could not see anything because of another man sitting in his lap.

The defendant says the occupants of the car were looking at some deer to the right of the road. Plaintiffs admit there were some deer on the right of the road, but not at the place of the collision but from one-half to three-quarters of a mile back from the place of the collision. The evidence, however, convinces us they were looking at the deer at the time of the accident; but, if we are mistaken in this, it is at least true, as they admit, that they were looking out to the right and not at the road and, therefore, cannot testify to the position on the road of either the truck or their own car. Every automobile driver knows how quickly and how imperceptibly a car may leave its side of the road when he looks away.

The testimony of all the plaintiffs, except the driver, is valuable only on the position of the cars after the accident. This we shall discuss later.

Plaintiff McGregor, the driver of the car, says he saw the truck when it was 325 feet away, and that it was on its wrong side of the road and he was on his right side; but this statement does not stand up under scrutiny. We are convinced that McGregor, too, was looking out to the right and that he did not see the truck until just an instant before the collision. It is too great a tax on our credulity to ask us to believe that a driver, seeing a loaded truck bearing down on him on its wrong side of the road, will take no step to avoid the collision until just an instant before the crash, although he had ample opportunity to do so; and yet this is what McGregor says. He says he saw the truck 325 feet away, on its wrong side of the road coming straight at him. He says he did not blow his horn, he says he did not put on his brakes, he says he did not pull his car over to the right, although he could have run it entirely off the road with

safety. He did nothing to avoid the collision until the truck was within 25 feet of him, which, at the speed both vehicles were traveling, is less than a second away. By his own admission, he made no effort to avoid the collision until it was too late to have any chance to avoid it. His failure to do so can only be explained by the supposition that he had not seen the truck until he jerked his car to the right. All the testimony shows the truck was then about 25 feet away.

Other testimony indicates that McGregor was looking out to the right and had not seen the truck until too late to avoid the collision. The truck driver says he went up to McGregor's car after the crash and said, "What was the trouble, Bill," and that McGregor replied, "We were looking at those damn deer over there." A man by the name of Ralph, who at the time was working for the Phelps-Dodge Corporation and who knew McGregor well, says he saw McGregor in front of the Mancos Hotel a short time after he had gotten out of the hospital and asked him "how in the world" the accident had happened. He said McGregor replied that he was watching some deer and that his car had gotten over on the wrong side of the road. Durrett, the other occupant of the truck, says that McGregor told him that he was watching a deer. McGregor in his signed statement made to Crouch, the ranger at the Park who investigated the accident, said they saw some deer to the right of the road about 400 yards from the scene of the accident. Hess, another of the plaintiffs, in his signed statement to Crouch says, "All in the passenger car were looking at the deer before the collision."

We are convinced that McGregor did not see the truck until just an instant before the collision. He is, therefore, in no position to testify to the position on the road of either the truck or the car.

This is all the testimony offered by the plaintiffs, except as to the position of the vehicles on the road after the accident and the part of the car which was struck by the truck. This does not disprove the testimony of defendant's witnesses but corroborates it.

The witnesses are in remarkable agreement on the position of the car after the accident. Some of defendant's witnesses say its right front wheel was still on the oil mat, but near the east edge of the road (plaintiff's side of the road). Plain-

tiffs' witnesses put the right front wheel from a foot to eighteen inches off the oil mat and on the shoulder of the road, and the left front wheel still on the oil mat. They all agree the car was sitting at about a 45-degree angle to the road.

There is more disagreement over the position of the truck after the accident. Some of the evidence places the left front wheel of the truck at from two to three feet east of the center of the road and the right front wheel to the west of it. (It seems the car was knocked back by the collision some two or three feet so that a man could have walked between the two vehicles. This accounts for the difference between the positions of the fronts of the two vehicles after the accident.) Other evidence places the left front wheel of the truck "near" the east edge of the oil mat.

But there is one thing about which the parties do not disagree, that is, that the car and the truck completely blocked the road, so that no one could have passed either on the east side or the west side. Admittedly, the car was blocking the east side, so it was the truck that was blocking the west side; it was blocking the west side, although the driver had cut it over to the east side just before the collision. Of necessity, therefore, the truck must have been on its right side of the road before the collision, as defendant's witnesses say.

On the other hand, the position of plaintiff's car after the accident tends to disprove their statement that they were on their right side before the accident, and supports the statement of defendant's witnesses that they were on their wrong side. Plaintiffs' testimony is that their right wheels were within 18 inches of the east edge of the oil mat before the accident, and after the accident the right front wheel was 18 inches off of the east edge. For this to be true, plaintiff's car would have traveled not more than three feet to the right after McGregor jerked it in that direction, and not even this far if we take into account the distance it was knocked off toward the side of the road by the impact. But it must have traveled three or four times this far, since the truck was 25 to 30 feet away when the car was jerked to the right. Had it been on its right side of the road, as plaintiffs say, it would have run completely off the road before the collision. The

paved portion was only 10 feet on each side of the center of the road, with a shoulder of two feet on each side. After the impact, the car having stopped only one and one-half feet off the oil mat, it must have been over on the west side of the road when it was jerked to the right. This is the testimony of defendant's witnesses.

A reading of the testimony convinces us that the truck was on its proper side of the road, that the driver was keeping a lookout ahead, and that he made every effort to avoid the collision that a reasonably prudent man would have made. When he saw plaintiff's car on the wrong side of the road he blew his horn at him to try to attract his attention. When this did not succeed, he put on his brakes, but seeing that plaintiff's car was still continuing on in his direction and was about to run into him, he cut his truck over to the vacant side of the road, although this was his wrong side. This was the only thing that he could have done which might possibly have avoided the accident because a ditch on his side of the road prevented his pulling to his right. As it turned out, it was the wrong thing for him to have done, because at the same instant plaintiff cut his car over to the same side of the road; but defendant cannot be held accountable therefor because it was plaintiff's negligence that had put the driver in this predicament. It is well settled that where a party's negligence has placed the other party in a position of peril, he is not responsible for taking a course of conduct which under the surrounding facts and circumstances at the time appeared to be a reasonable and prudent thing to do, although it turned out that it was the wrong thing to have done. *Omaha Water Co.* v. *Schamel*, 147 Fed. 502; *Hoff* v. *Minneapolis, etc., R. Co.*, 14 Fed. 558; *Southern Railway* v. *Smith*, 214 Fed. 942; *Southern Railway* v. *Sutton*, 179 Fed. 471.

The defendant also defends on the ground the driver of plaintiffs' car was at least guilty of contributory negligence. This is undoubtedly true. It then says his negligence is imputable to the passengers in the car, since it was being operated for their common benefit in going to and from their work, and that each contributed his share toward the expense of its operation. It is unnecessary to decide whether or not this is so, since we are of opinion the defendant was guilty of no negligence proximately contributing to the accident; but

on the point see *Adams* v. *Swift*, 172 Mass. 521; 52 N. E. 1068; *Derrick* v. *Salt Lake & O. R. Co.*, 168 Pac. 335; *Griffiths* v. *Lehigh Valley Transit Co.*, 292 Pa. 489, and other cases collected in 48 A. L. R. 1083. Cf. *Campbell* v. *Campbell*, 104 Vt. 468, 162 Atl. 379, 85 A. L. R. 626.

On the whole case we are of the opinion that the plaintiffs are not entitled to recover. Their petitions will be dismissed. It is so ordered.

Madden, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, dissenting:

I cannot agree with the conclusion reached by the majority.

I would approve the facts substantially as they were found by the commissioner of the court instead of as found by the court.

The testimony is hopelessly conflicting. If the testimony of the several plaintiffs is worthy of belief, they are entitled to recover. To deny such recovery it is necessary to accept the testimony of the truck driver and the other employee who was with him and to disregard the testimony of the plaintiffs.

I think the physical facts support the plaintiffs' testimony. The plaintiffs were going upgrade in an Oldsmobile car; the other driver was coming downgrade in a truck loaded with piping. There was a bend in the road, the curve being toward the east. The outside of the curve was to the right of the truck driver. Admittedly when the collision occurred the truck driver was on the wrong side of the road. He claimed that he turned to that side just before the accident in a desperate attempt to avoid the collision with the plaintiff's car which he asserted had been driving on the wrong side of the road and which had turned back toward the eastern or proper side of the road at about the same time he turned.

The undisputed facts show that the Oldsmobile was going upgrade in second gear. The truck driver came over the crest of the hill and started downgrade in second gear, but after going a short distance shifted to high gear and with

a loaded truck was going down the hill in high gear at the time of the collision.

The curve in the road was not a sharp one. If the truck driver's testimony is accepted that both cars were driving on the outer rim of the road they could have seen each other at a considerably greater distance than if they were driving near the center or near the inner circle of the road.

The position of the vehicles near the inner circle of the road after the accident, the fact that the plaintiffs were driving in second gear while the truck driver had shifted to high gear coming downgrade with a loaded truck, and the shorter distance that they could see each other if they were near the inside of the road, all tend to support the view that the truck driver was cutting in to the center if not to the inner side of the road. Plaintiff McGregor who was driving the Oldsmobile testified that when he saw the truck it was zigzagging down near the center of the road and that he could not tell which way it was going to turn.

This is a fact case. In my judgment the physical facts overwhelmingly support the testimony for the plaintiffs. The truck driver was guilty of negligence and that negligence was the proximate cause of the collision and injury, and neither of the plaintiffs was guilty of contributory negligence.

I would find for the plaintiffs in the respective amounts set out in the findings of the commissioner's report.

LITTLETON, *Judge*, concurs in this opinion.

ON MOTION FOR A NEW TRIAL

WHITAKER, *Judge*, delivered the opinion of the court:

On motion for a new trial exception is taken to the participation in these cases of the Judge who wrote the opinion of the court, because the cases were pending while he was Assistant Attorney General in charge of the Claims Division of the Department of Justice. At no time did he direct or participate in directing the conduct of these cases, nor did he have any knowledge of the facts or issues involved until the cases were argued before this court. When they

were argued it had been three and a quarter years since he had been Assistant Attorney General. He was present on the bench when the cases were argued and participated in the argument without objection. His participation in the cases under such circumstances was in line with precedent established by Justices of the Supreme Court and, in the opinion of this court, was proper.

The motion for a new trial on this ground and all other grounds is overruled. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, Chief Justice, concur.

PACIFIC AIR TRANSPORT v. THE UNITED STATES

No. 43029

BOEING AIR TRANSPORT, INC., v. THE UNITED STATES

No. 43030

BOEING AIR TRANSPORT, INC., v. THE UNITED STATES

No. 43031

UNITED AIR LINES TRANSPORT CORPORATION v. THE UNITED STATES

No. 43032

UNITED AIR LINES TRANSPORT CORPORATION v. THE UNITED STATES

No. 43033

[Decided December 7, 1942. Plaintiffs' motions for new trial overruled March 1, 1943]

On the Proofs

Air mail contracts; agreement by operators; annulment under section 3950, Revised Statutes.—Where, at the invitation of the Postmaster General, representatives of air line operators, including plaintiffs, met in Washington and after conferences among themselves, agreed to the allocation to certain of such conferees of

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seven proposed air mail routes and further agreed to submit to determination by the Postmaster General of the allocation of five other such routes; and where, thereafter, none of said operators, including plaintiffs, made any attempt to obtain the right to carry air mail over any of said routes unless such operator was so designated in said allocation or selected by the Postmaster General in accordance with said agreement, all without competitive bidding; it is *held* that such agreement was in violation of section 3950, Revised Statutes, and contracts held by parties to such agreement were subject to annulment by the Postmaster General in accordance with the provisions of the statute.

Same; agreement applying to contracts awarded on bids as well as to extensions of routes.—While representatives of air line operators, in conference, agreeing to the allocation of air mail contracts without competitive bidding, may have been thinking largely along the line of such contracts being awarded by extensions of routes rather than on bids following advertisements, such agreement was never expressly so limited, and the principal conferees, including plaintiffs, always conducted themselves thereafter as if their agreements applied to contracts awarded after advertisements for bids as well as to contracts awarded by extension.

Same; consent by Postmaster General to agreements immaterial.—It is immaterial that the Postmaster General consented to agreements to allocate air mail routes without competitive bidding, or that the Postmaster General urged such agreements upon the operators of air mail lines called into conference by him; section 3950, R. S., makes no exception of a combination or agreement consented to or instigated by a public officer.

Same; evasion of statute requiring bids.—The obvious purpose of the power conferred by statute upon the Postmaster General to grant "extensions" of air mail routes was to promote the public convenience and economy by adding a segment to an air mail line, so that there would be continuity in its service, utilizing on the extension the facilities already existing on the line; and to grant an extension to an existing line flown by A, with the understanding that the extension was to be immediately sublet to B who would fly the extension and receive the pay for it, was the opposite of such purpose; and such procedure, as used in the instant cases, was a device for awarding an air mail contract to B without competitive bidding; and was an evasion of the statute requiring advertisements for bids.

Same; combination to avoid competitive bidding.—An agreement among operators of air mail lines to carry out a device by which extensions of existing lines would be granted and contracts for such extensions would be sublet to other selected operators was a combination to avoid competitive bidding for such contracts.

Same; agreement to accept extensions of routes and sublet same to nominees of Postmaster General.—An agreement on the part of

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operators of air mail routes, including plaintiffs, to accept "extensions" of such routes as requested by the Postmaster General and to sublet such extensions to nominees of the Postmaster General, so far as participants in such agreements were concerned, could have no other effect than to give to selected operators the emoluments of air mail contracts without giving an opportunity to bid to competitors who might be willing to do the work for less, and such agreement was in this respect in violation of section 3950, R. S., and contracts of operators who entered into such contracts were under the provisions of the statute liable to annulment.

Same; evolution of agreement to accept allocation of routes.—In the instant cases the agreement among operators of air mail routes, including plaintiffs, as to the allocation of certain air mail routes among themselves evolved, as the necessity for such evolution is shown to have developed, into an understanding that even if the Postmaster General should be required to advertise for bids covering certain routes still there would be no competitive bidding by those, including plaintiffs, who had participated in such agreement in conference; and the evidence adduced shows that such understanding was scrupulously followed by all the principal participants, including plaintiffs.

Same; agreement as to southern transcontinental route; sole bidder.—In the matter of the establishment of the "southern transcontinental route," which under the policy of the then Postmaster General had been allocated to the Aviation Corporation (not a plaintiff) in accordance with the conference agreement to which plaintiffs were parties, it is established by the evidence adduced that said Aviation Corporation before bids were asked for or submitted had proceeded to comply with the Postmaster General's desires that Aviation Corporation "take care of the equities" of other operators who had been carrying passengers, and in some cases mail, between some of the towns along the proposed route, by buying out or absorbing such operators; and advertisements for bids for said southern transcontinental route were withheld until said Aviation Corporation notified the Post Office Department by telegram that it "was satisfied to have advertisement published tomorrow"; and such advertisement was so published; and Aviation Corporation, bidding 100% of the maximum permissible rate, was the sole bidder.

Same; agreement as to middle transcontinental route; attempt to secure withdrawal of bid.—In the matter of the establishment of "the middle transcontinental route," it is established by the evidence adduced that Transcontinental Air Transport and Western Air Express (both of which had participated with plaintiffs in a conference called by the Postmaster General, but neither of which is a party to the instant suits) had been informed by Postmaster General Brown, in accordance with the agreement arrived at in

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such conference, that if the said two companies would form a combination to operate said route as a single unit he would give them the air mail contract; and when such combination was formed and submitted a bid and a third company, United Avigation, Inc., not a party to said agreement, also submitted a bid, it is established by the evidence adduced that representatives of plaintiffs and of other companies which were parties to said agreement exerted themselves to secure the withdrawal of said bid by said United Avigation, Inc.

Same; northern transcontinental route; Watertown extension; avoidance of bidding.—In the matter of the establishment of an air mail line from Omaha, Nebraska, to Watertown, South Dakota, it is established by the evidence adduced that in response to pressure to establish such line, Postmaster General Brown requested the plaintiff, Boeing Air Transport, Inc., which was one of the group having the northern transcontinental route through Omaha, to take this lateral line as an "extension," on the understanding that the line would be sublet to some operator to be nominated by the Postmaster General, and plaintiff, Boeing Air Transport, Inc., so agreed and did take said Watertown line, thus obviating advertisement for bids, in violation of section 3950, Revised Statutes, and consequently the air mail contracts of said Boeing Air Transport, Inc., became liable to annulment under the provisions of the statute.

Same; air mail pay earned and not paid before annulment of contracts.—Where on February 9, 1934, the then Postmaster General, pursuant to the authority vested in him by section 3950, Revised Statutes, and by virtue of the general powers of the Postmaster General, issued an order (No. 4959) annulling as of February 19, 1934, the air mail contracts then held by the plaintiffs; it is *held* that such annulment did not forfeit air mail pay earned by plaintiffs under said contracts before such annulment, and not paid to plaintiffs at the time of such annulment; and plaintiffs are therefore entitled to recover the amount of such accrued pay.

Same; violations of section 3950, Revised Statutes, annulment of contracts; damages.—It is *held* upon the evidence adduced that plaintiffs in three respects engaged in violation of the provisions of section 3950, Revised Statutes; that there were accordingly valid grounds for the annulment of plaintiffs' air mail route certificates; and that the several annulments did not constitute breaches of contract for which plaintiffs would be entitled to recover damages.

Same; recovery on defendant's counterclaims denied.—It is *held* that the defendant is not entitled to recover on its counterclaims:

1. (a) It is not established that plaintiffs improperly secured their air mail route certificates, and defendant is therefore not entitled to recover back all moneys paid plaintiff for carrying the mail in excess of the reasonable value of services rendered. **(Section 3950 R. S.)**

(b) If the contractor against whom the Government asserted the claim had been the contractor who was awarded the contract concerning which competitive bidding was suppressed, so that said contractor profited directly from the suppression, the relation of cause and effect between the tort and the payments received under the contract might have been such that the defendant would have been entitled to recover on the theory of *quantum meruit;* here, however, two of plaintiffs' five routes were awarded before the conference and one during the conference and on two others the certificates were issued even earlier.

2. It is not established that plaintiffs were paid more for their services than the statute authorized.

3, 4. It is not established that plaintiffs did not comply with departmental regulations as to mail space furnished and rates charged therefor.

5. The Watres Act (46 Stat. 259) removed the prohibition (45 Stat. 594) against paying a higher rate under a "route certificate" than the rate set in the contract superseded by such certificate.

The Reporter's statement of the case:

Messrs. Paul M. Godehn and *Louis G. Caldwell* for the plaintiffs. *Mr. Donald C. Beelar, Mayer, Meyer, Austrian & Platt*, and *Kirkland, Fleming, Green, Martin & Ellis* were on the briefs.

Mr. Assistant Attorney General Francis M. Shea and *Mr. William W. Scott* for the defendant. *Messrs. Sidney J. Kaplan* and *Elihu Schott* were on the brief.

The plaintiffs claim compensation for services rendered in the transportation of mail by aircraft during January and February 1934, and damages for cancellation of five airmail contracts, or route certificates, hereinafter described. The jurisdiction of the court is invoked under Section 145 of the Judicial Code and under Section 8 of the Air Mail Act of 1934 (48 Stat. 933). As its special defense and without waiving any of the defenses under the general traverses theretofore filed, defendant filed a special answer and counterclaim in each case.

By agreement the above-entitled cases were heard at the same time without consolidation for other purposes and a single transcript of evidence was made applicable to all cases. The findings hereinafter set forth are classified into findings which are primarily applicable to a particular case

and findings which are generally applicable to all five cases without regard to whether such findings relate to plaintiffs' claims or defendant's defenses and counterclaims. In all instances where air-mail contracts are referred to, whether of plaintiffs or otherwise, the reference is to domestic air-mail contracts as distinguished from foreign air-mail contracts which, if mentioned, will be specifically so designated.

Having made the foregoing introductory statement, the court made special findings of fact as follows:

Pacific Air Transport, No. 43029

1. Pacific Air Transport is a corporation organized and existing under the laws of the State of Oregon. It was engaged in the business of transporting mail, passengers, and express by aircraft from on or about September 15, 1926, until February 19, 1934, and thereafter was engaged in the business of transporting passengers and express by aircraft until on or about May 1, 1934.

2. July 15, 1925, the Postmaster General advertised for bids for carrying United States mail by aircraft from Seattle, Washington, to Los Angeles, California, via certain intermediate points, and return, under the conditions stated in the advertisement. Vern C. Gorst submitted a bid at a rate of 75 percent of the postage revenue to be derived from such air mail. That bid was accepted and on January 27, 1926, a contract was duly entered into between Gorst and the defendant, pursuant to the advertisement and bid, for a period not exceeding four years from the date of the execution of the contract, the route being known as C. A. M. 8. In this instance as well as in the others involving contracts entered into between plaintiffs and the defendant, appropriate bonds were furnished.

3. March 19, 1926, the contract of January 27, 1926, between Vern C. Gorst, as contractor, and the defendant was sublet by the contractor to Pacific Air Transport, with the written consent of the Postmaster General, and the Post Office Department thereafter recognized Pacific Air Transport as the subcontractor on Route C. A. M. 8.

4. Pursuant to an amendment to the Air Mail Act of February 2, 1925, approved June 3, 1926 (44 Stat. 692),

amendatory agreements relating to Route C. A. M. 8 were entered into between Pacific Air Transport and Vern C. Gorst on August 25, 1926, and between Vern C. Gorst and the defendant on September 2, 1926, under the terms of which the rate of compensation to be paid to Pacific Air Transport for the transportation of air mail on Route C. A. M. 8 was fixed at $2.8125 per pound, including equipment, for the first 1,000 miles, and $3.09375 per pound, including equipment, for transportation in excess of 1,000 miles, but not in excess of 1,100 miles.

5. The Postmaster General designated September 15, 1926, as the date on which performance was to commence on Route C. A. M. 8 under the contract of January 27, 1926, as amended, and on September 15, 1926, Pacific Air Transport commenced the transportation of United States air mail on that route, and continued to carry on such transportation until February 19, 1934, with such variations in arrangements and conditions as hereinafter appear.

6. January 23, 1930, the Postmaster General by order extended the contract of January 27, 1926, for a period not to exceed six months from January 26, 1930, the order granting such extension stating that the contract was continued in force "for a period of not to exceed six months in accordance with the authority contained in paragraph 2, section 1356, Postal Laws and Regulations." Certain facts and circumstances connected with the granting of this extension and of extensions granted at or about the same time to certain of the other plaintiffs are set out in Findings 73 and 74.

7. May 27, 1930, the Postmaster General, acting pursuant to an amendment to the Air Mail Act of February 2, 1925, known as the McNary-Watres Act, approved April 29, 1930 (46 Stat. 259), executed and issued to Pacific Air Transport an air-mail route certificate for the transportation of air mail on Route C. A. M. 8, thereafter known as A. M. 8, between Seattle, Washington, and Los Angeles, California, until April 5, 1936. May 27, 1930, Pacific Air Transport surrendered to the Postmaster General its contract of January 27, 1926, in exchange for that air-mail route certificate, and accepted in writing the air-mail route certificate of May

27, 1930. At or about the time of the execution of that air-mail route certificate, Pacific Air Transport executed and delivered to the Postmaster General its performance bond in the penal sum of $12,000 conditioned as required by postal laws and regulations, and deposited with the Postmaster General as security thereunder $12,000 face value United States of America Liberty Loan bonds, which bond and deposit were accepted and approved by the Postmaster General.

8. The route certificate referred to in the preceding finding read as follows:

> WHEREAS, Section 2 of the Act of Congress approved on the 29th day of April 1930, entitled "AN ACT TO AMEND THE AIR MAIL ACT OF FEBRUARY 2, 1925, AS AMENDED BY THE ACTS OF JUNE 3, 1926, AND MAY 17, 1928, FURTHER TO ENCOURAGE COMMERCIAL AVIATION," is as follows:
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> "The Postmaster General may, if in his judgment the public interest will be promoted thereby, upon the surrender of any air mail contract, issue in substitution therefor a route certificate for a period of not exceeding ten years from the date service started under such contract to any contractor or subcontractor who has satisfactorily operated an air mail route for a period of not less than two years, which certificate shall provide that the holder thereof shall have the right, so long as he complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operations to the advances in the art of flying and passenger transportation, to carry air mail over the route set out in the certificate or any modification thereof at rates of compensation to be fixed from time to time, at least annually, by the Postmaster General, and he shall publish in his annual report his reasons for the continuance or the modification of any rates: *Provided*, That such rates shall not exceed $1.25 per mile. Such certificate may be cancelled at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be cancelled."
>
> AND WHEREAS, VERN C. GORST, an individual and citizen of the United States, on the twenty-seventh day

of January 1926, duly entered into a contract with the United States to transport the air mail by aircraft on a route from SEATTLE, WASHINGTON, BY CERTAIN DESIGNATED POINTS, TO LOS ANGELES, CALIFORNIA, AND RETURN, and on the sixth day of March 1926, THE PACIFIC AIR TRANSPORT, OF OAKLAND, CALIFORNIA, a corporation duly organized and existing under the laws of the State of Oregon, hereinafter called the Carrier, became the subcontractor on this route, the said contract having been extended pursuant to the terms thereof for a period of not to exceed six months and presently being in full force and effect;

AND WHEREAS, the said Carrier has satisfactorily operated said air route for a period of not less than two years, to wit, from the fifteenth day of September 1926, and is willing to surrender the said air mail contract and accept in substitution therefor a route certificate as provided in Section 2 of the Act of Congress approved the 29th day of April 1930;

AND WHEREAS, in the judgment of the Postmaster General, the public interest will be promoted by the issuance to said Carrier of a route certificate in substitution for said contract;

NOW THEREFORE, pursuant to the authority in me vested by the provisions of said Act, I hereby certify that said PACIFIC AIR TRANSPORT, OF OAKLAND, CALIFORNIA, shall have the right, so long as it complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operations to advances in the art of flying and passenger transportation, to carry air mail over the route hereinafter set out or any modification thereof, at rates of compensation fixed herein, or to be fixed from time to time, at least annually, by the Postmaster General, provided that such rates shall not exceed $1.25 per mile for a period ending not more than ten years from the date of beginning service under said contract, to wit, on the FIFTH day of APRIL 1936; subject to the following conditions:

TERMS AND CONDITIONS

1. The issuance of this certificate by the Postmaster General and its acceptance by the Carrier as hereinafter provided shall be deemed a full mutual release of the United States and the said Carrier from all the terms, conditions, and obligations of the air mail contract hereinbefore referred to, dated the twenty-seventh day of January 1926, from the date of the acceptance of this

certificate, except compensation due for services performed prior to the date hereof, and upon the acceptance thereof the said Carrier shall surrender the said contract to the United States.

2. The route over which the Carrier shall have the right to carry air mail shall be from SEATTLE, WASHINGTON, BY CERTAIN DESIGNATED POINTS, TO LOS ANGELES, CALIFORNIA, AND RETURN, including any extension or other modification of said route that may be made as hereinafter provided.

3. Upon 60 days' notice to the Carrier, the Postmaster General from time to time may modify said route by an extension or extensions thereof, including lateral extensions or consolidations, and prescribe the schedule therefor including the stops thereon, and determine the mileage upon which the compensation of the Carrier is to be based.

4. For the purposes of this certificate the distance between the terminal points of the route hereinbefore prescribed shall be deemed to be 1,130 miles.

5. The aircraft employed by the Carrier in the service authorized hereby shall be manufactured in the United States. They shall be of modern design, airworthy, and suitable for the service prescribed; the design and capacity of such aircraft, and the location, size and construction of the mail compartments therein, shall be subject to the approval of the Postmaster General.

The following service may be prescribed by the Postmaster General:

A—Night Mail Service.
B—Night Mail and Passenger Service.
C—Day Mail Service.
D—Day Mail and Passenger Service.

6. Until and including the THIRTY-FIRST day of DECEMBER 1930, or until otherwise directed by the Postmaster General, the Carrier shall provide the following service over said route:

(1) One flight by a plane having not less than 25 cubic feet of space for 400 pounds of air mail, and accommodations for not less than 2 passengers, departing from Portland, Oregon, at 7:15 a. m., daily, to be classified as CLASS D service, and payment made therefor at the rate of seventy-seven cents ($0.77) per mile, until otherwise ordered.

(2) One flight by a plane having not less than 25 cubic feet of space for 400 pounds of air mail, and accommodations for not less than 2 passengers, departing from Los

Angeles at 11:45 p. m., daily, to be classified as CLASS B service, and payment made therefor at the rate of ninety-two cents ($0.92) per mile for night flying and seventy-seven cents ($0.77) per mile for day flying, until otherwise ordered.

7. Upon 60 days' notice to the Carrier, the Postmaster General may increase, diminish, or modify the service above prescribed, and make such adjustments in the compensation of the Carrier as he may deem proper.

8. The Carrier shall transport the mails of the United States offered for carriage over the route hereinbefore set out with due celerity, in a safe and secure manner, free from wet or other injury, receiving and delivering the same at fields and points therein designated on schedules prescribed by the Postmaster General.

9. Payments shall be made to the Carrier monthly upon evidence that the service authorized hereby has been well and faithfully performed in accordance with the provisions hereof.

10. The Carrier shall keep and maintain an accurate system of accounting in accordance with regulations prescribed by the Postmaster General. These accounts shall include a record of all obligations, investments, expenditures, receipts and earnings from any source whatsoever, and shall be subject at all reasonable times to inspection and audit by the Post Office Department. The Carrier shall furnish to the Postmaster General such information regarding its accounts and operations as he may from time to time require.

11. The Carrier shall not directly, or indirectly, promote the use of the air mail over the route hereinbefore set out, or any other air-mail route except in accordance with regulations prescribed by the Postmaster General.

12. This certificate is issued upon the express conditions that the said Carrier will hold itself subject to all the conditions imposed by the several Acts of Congress relating to the Air Mail Service and to all the provisions of the law relating to Post Offices and the Postal Service generally insofar as they are applicable to the Air Mail Service; that no Member of or Delegate to Congress shall be admitted to any share or part of the benefits accruing to it hereunder; and that it has not employed a third person to solicit or obtain the same, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation

for service in connection therewith, any brokerage, commission, or percentage, upon the amount receivable by it thereunder, and that it has not, in estimating the price at which it undertakes hereunder to carry the mail, included any sum by reason of any such brokerage, commission, or percentage, and that all money payable to it hereunder is free from obligation to any person for services rendered, or supposed to have been rendered, in the procurement of this certificate. And it is understood that a breach of this condition shall constitute adequate cause for the cancellation of this certificate by the Postmaster General, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

13. The said Carrier shall be responsible for the persons to whom it commits the custody and transportation of the mails, and the observance of the law by such persons and the faithful performance of the duties required by it of them; and shall not commit the custody or transportation of the mails to any person under sixteen years of age, nor to any person under a sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction, nor to any person not authorized by law to be concerned in contracts for carrying the mail.

14. The said Carrier shall be answerable in damages to the United States for any breach by it, or by its officers or agents, of the terms and conditions set out herein; and for such a breach, or for inferior service, or for loss of or damage to the mail through its fault or that of its officers or agents, the Postmaster General may make such deductions from the pay of the said Carrier as he may deem proper.

15. This certificate may be cancelled by the Postmaster General at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for its guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be cancelled.

16. By agreement of the Postmaster General and the Carrier, the life of this certificate may be curtailed, said certificate may be cancelled, or any other modification may be made herein not inconsistent with law.

17. The Postmaster General shall have the right at any time during the period of service authorized hereby to require the Carrier to furnish surety other than that

for which provision is hereafter made, and in his discretion to increase or reduce the amount of the bond that has been furnished by the Carrier.

18. The delivery to and acceptance and approval by the Postmaster General of a bond in the sum of $12,000.00 conditioned upon the faithful and efficient performance in accordance with the terms and conditions hereinbefore set out, of the service intended to be authorized by this certificate, duly executed by a surety acceptable to the Postmaster General; and the acceptance of this certificate upon the said terms and conditions, evidenced by the counter-signature of the said Carrier, shall be conditions precedent to the vesting of any right in the said Carrier by virtue hereof.

WITNESS my hand and seal this twenty-seventh day of MAY 1930.

(Signed) WALTER F. BROWN,
Postmaster General.

Witness to signature of the Postmaster General:
(Signed) W. IRVING GLOVER.

Accepted upon the terms and conditions above set out this 27th day of MAY 1930.

PACIFIC AIR TRANSPORT,
(Signed) P. G. JOHNSON,
V. President.

9. The route certificate of May 27, 1930, and an order of the Post Office Department entered May 29, 1930, effective June 1, 1930, prescribed the schedules, departure times, termini, stops, mileage, space-weight reservations, and the rate of compensation per mile; and modifications with respect thereto were made from time to time thereafter by some twenty orders issued by the Post Office Department. As illustrative of the changes which were made under the foregoing orders of the Post Office Department, after the issuance of the route certificate (which is likewise illustrative of changes made in other route certificates hereinafter referred to), the total rates per mile at the inception of the route certificate were 77 cents per mile from Portland, Oregon, to Los Angeles, California (a daylight trip), and 92 cents per mile from Los Angeles, California, to Portland, Oregon (a night trip with 15 cents per mile allowed for night flying); whereas on December 14, 1933, the rates under the same route certificate from Seattle, Washington,

to Los Angeles, California (leaving at 6:00 a. m.), were 43 cents per mile and the same rate from Los Angeles, California, to Portland, Oregon (leaving at 8:50 a. m.). Many changes in rates were made during the intervening period. Likewise additional schedules were added and some discontinued during the same period and changes were made in the termini of the routes, the places served, and the character of service rendered. The orders referred to in this finding and in Findings 18, 38, 46, and 54 were signed by various officials of the Post Office Department, including some twenty-five signed by W. Irving Glover, Second Assistant Postmaster General, and Chase C. Gove, Acting Second Assistant Postmaster General.

10. The Postmaster General and the Pacific Air Transport entered into an agreement amending the route certificate of May 27, 1930, which amendment read as follows:

AMENDMENT

Under authority of the Act of April 29, 1930, 39 U. S. C. 465c. Supp. V., and in accordance with the terms contained in the route certificate issued under date of May 27, 1930, to PACIFIC AIR TRANSPORT, of Oakland, California, upon surrender by it of the contract with the United States to transport air mail by aircraft on a route from Seattle, Washington, by certain designated points, to Los Angeles, California, and return, Paragraph 16 of the air-mail route certificate is hereby amended so as to read as follows:

"16. By agreement of the Postmaster General and the Carrier the life of this certificate may be curtailed, said certificate may be cancelled, or any other modification therein be made, including extensions in the life thereof, not inconsistent with law."

WITNESS MY HAND AND SEAL this 24th day of February 1933.

(Signed) WALTER F. BROWN,
Postmaster General.

Witness to the signature of the Postmaster General:
ALICE E. MUMMENHOFF.

Accepted upon the terms and conditions above set out this 6th day of March 1933.

PACIFIC AIR TRANSPORT,
By P. G. JOHNSON,
Pres.

The change made by the above amendment to the route certificate, set out in Finding 8, was to add in the body of paragraph 16 the words "including extensions in the life thereof," and corresponding changes were made by similar amendments referred to in Findings 19, 36, 45, and 53.

At the time route certificates had been issued by the Postmaster General, the maximum expiration dates had been made the same in all cases, namely, April 5, 1936, in order that the Congress and the Postmaster General then in office might deal with the entire subject matter at one time. As a result, the period for operations under the later certificates was much shorter than under the earlier certificates. When route certificates were being issued for Routes 33 and 34, complaint was made by the carriers on those routes of the short period allotted them as compared with that for the carriers who had received route certificates at a much earlier period. In answer to that complaint the Postmaster General executed amendments to all route certificates which added the specific provision referred to above, permitting the appropriate parties to extend the life of the route certificates beyond April 5, 1936, should they so desire.

11. June 7, 1930, the Postmaster General, acting under the provisions of the McNary-Watres Act of April 29, 1930, and the Air Mail Route Certificate of May 27, 1930, ordered Pacific Air Transport to extend Route A. M. 8 between Seattle and Los Angeles—a distance of 1,100 miles—from Los Angeles to San Diego—a distance of 120 miles—effective July 1, 1930. Pacific Air Transport began the transportation of air mail over the extended portion of the route between Los Angeles and San Diego on July 1, 1930, and continued the transportation of air mail over the route as extended until February 19, 1934. The foregoing order of June 7, 1930, was issued at the request of Pacific Air Transport as will be hereinafter shown.

Boeing Air Transport, Inc., No. 43030

12. Boeing Air Transport, Inc., is a corporation organized and existing under the laws of the State of Washington. It was engaged in the business of transporting mail, passengers, and express by aircraft from on or about July 1,

1927, until February 19, 1934, and thereafter was engaged in the business of transporting passengers and express by aircraft until on or about May 1, 1934.

13. November 15, 1926, the Postmaster General advertised for bids for carrying United States mail by aircraft from Chicago, Illinois, to San Francisco, California, via certain intermediate points, and return, under the conditions stated in the advertisement. Boeing Airplane Company and Edward Hubbard submitted a bid at a rate of $1.50 per pound for the first 1,000 miles and 15 cents per pound for each additional 100 miles. That bid was accepted and on February 1, 1927, a contract was duly entered into pursuant to the advertisement and bid between these bidders and the defendant for a period not exceeding four years. That route was known as C. A. M. 18.

14. April 29, 1927, the contract of February 1, 1927, between Boeing Airplane Co. and Edward Hubbard, as contractors, and the defendant was sublet by the contractors to Boeing Air Transport, Inc., with the written consent of the Postmaster General, and the Post Office Department thereafter recognized Boeing Air Transport, Inc., as the subcontractor on Route C. A. M. 18.

15. The Postmaster General designated July 1, 1927, as the date on which performance was to commence on Route C. A. M. 18 under the contract of February 1, 1927, and on July 1, 1927, Boeing Air Transport, Inc., commenced the transportation of United States air mail on that route and continued to carry on such transportation until February 19, 1934, with such variations in arrangements and conditions as hereinafter appear.

16. October 21, 1930, the Postmaster General, acting pursuant to an amendment to the Air Mail Act of February 2, 1925, known as the McNary-Watres Act, approved April 29, 1930, executed and issued to Boeing Air Transport, Inc., an air-mail route certificate for the transportation of air mail on Route C. A. M. 18 (thereafter known as A. M. 18) between Chicago, Illinois, and San Francisco, California, until April 5, 1936. October 29, 1930, Boeing Air Transport, Inc., surrendered to the Postmaster General its contract of February 1, 1927, in exchange for the air-mail route

certificate and accepted the air-mail route certificate of October 21, 1930, in writing. At or about the time of the execution of the air-mail route certificate, Boeing Air Transport, Inc., executed and delivered to the Postmaster General its performance bond in the penal sum of $251,000, executed by itself as principal and United States Fidelity and Guaranty Co. as surety, conditioned as required by postal laws and regulations, which bond was accepted and approved by the Postmaster General. The route certificate of October 21, 1930, was in general terms similar to the route certificate issued to Pacific Air Transport and set out in Finding 8.

17. The Postmaster General in issuing the route certificate of October 21, 1930, found that the original contract of February 1, 1927, was duly entered into between Boeing Airplane Co. and Edward Hubbard, as contractors, and the defendant; that on April 29, 1927, Boeing Air Transport, Inc., became the subcontractor on Route C. A. M. 18; that the contract of February 1, 1927, was in full force and effect; that Boeing Air Transport, Inc., had satisfactorily operated Route C. A. M. 18 for a period of not less than two years, namely, from July 1, 1927; and that in the judgment of the Postmaster General the public interest would be promoted by the issuance of the route certificate to Boeing Air Transport, Inc., in substitution for its air-mail contract.

18. The route certificate of October 21, 1930, and an order of the Post Office Department entered October 29, 1930, effective November 1, 1930, prescribed the schedules, departure times, termini, stops, mileage, space-weight reservations, and the rate of compensation per mile; and modifications with respect thereto were made from time to time thereafter by some fourteen orders issued by the Post Office Department.

19. The Postmaster General and Boeing Air Transport, Inc., entered into an agreement amending the route certificate of October 21, 1930, so as to provide in paragraph 17 thereof that by agreement of the Postmaster General and the carrier, the life of the certificate could be curtailed, the certificate canceled, or any other modification made therein, including extensions in the life thereof not inconsistent with

law. The amendment was similar to that set out in Finding 10. It was executed by the Postmaster General on February 24, 1933, and accepted by the Boeing Air Transport, Inc., on March 6, 1933.

20. June 30, 1931, the Postmaster General, acting under the provisions of the McNary-Watres Act of April 29, 1930, and the air-mail route certificate of October 21, 1930, ordered Boeing Air Transport, Inc., to extend Route A. M. 18 which operated between Chicago and San Francisco—a distance of 1,931 miles—from Omaha, Nebraska, via Sioux City, Iowa, and Sioux Falls, South Dakota, to Watertown, South Dakota—a distance of 259 miles—effective August 1, 1931. This extension was not solicited or desired by Boeing Air Transport, Inc., but was undertaken by the Boeing Air Transport, Inc., under circumstances which will hereinafter appear in Finding 106. By an order of the Post Office Department dated January 23, 1932, the effective date of the extension was changed from August 1, 1931, to January 16, 1932. Boeing Air Transport, Inc., began the transportation of air mail over the extended portion of that route between Omaha and Watertown on January 16, 1932, and continued the transportation of air mail over the route as extended until February 19, 1934. In addition to mail, the carrier transported passengers and express by aircraft over that extension during the period from January 16, 1932, to February 19, 1934, inclusive. The extension was operated at a loss during the entire period of its existence.

Boeing Air Transport, Inc., No. 43031

21. Boeing Air Transport, Inc., plaintiff in No. 43031, is the same corporation described in Finding 12.

22. July 15, 1925, the Postmaster General advertised for bids for carrying United States mail by aircraft from Elko, Nevada, via Boise, Idaho, to Pasco, Washington, and return, under the conditions stated in the advertisement. Walter T. Varney submitted a bid at a rate of four-fifths of the postage revenue to be derived from such air mail. That bid was accepted and on November 7, 1925 a contract was duly entered into between Varney and the defendant pursuant to

the advertisement and bid for an indefinite period subject to the statutory limitation of four years. That route was known as C. A. M. 5.

23. April 6, 1926, Walter T. Varney commenced the transportation of air mail on Route C. A. M. 5 under the air-mail contract of November 7, 1925, but because of difficulties encountered in operating over that route, the Postmaster General by order suspended operations on Route C. A. M. 5 until June 6, 1926, at which time operations were resumed.

24. Pursuant to an amendment to the Air Mail Act of February 2, 1925, aproved June 3, 1926, an amendatory agreement relating to Route C. A. M. 5 was entered into between Walter T. Varney and the defendant on July 9, 1926, under the terms of which the rate of compensation to be paid to the contractor for the transportation of air mail on Route C. A. M. 5 was fixed at $3.00 per pound, including equipment.

25. October 1, 1926, the southern terminal of Route C. A. M. 5 was changed by order of the Postmaster General from Elko, Nevada, to Salt Lake City, Utah.

26. May 1, 1929, the air-mail contract of November 7, 1925, between Walter T. Varney, as contractor, and the defendant was sublet by the contractor to Varney Air Lines, Inc., a corporation organized under the laws of Delaware, with the written consent of the Postmaster General, and the Post Office Department thereafter recognized Varney Air Lines, Inc., as the subcontractor on Route C. A. M. 5.

27. November 6, 1929, the Postmaster General, by order extended the contract of November 7, 1925, for a period not exceeding six months, the order granting such extension stating that the contract was "continued in force for a period not to exceed six months, under authority of paragraph 2, section 1356, Postal Laws and Regulations."

28. June 15, 1929, the Postmaster General, acting under the Air Mail Act of February 2, 1925, as amended by the Acts of June 3, 1926, and May 17, 1928, issued and published an advertisement stating that sealed proposals would be received at the office of the Second Assistant Postmaster General until August 15, 1929, for carrying United States mail by aircraft from Pasco, Washington, to Spokane, Washington, to Portland, Oregon, and to Seattle, Washington, under

the conditions stated in the advertisement, such route being then known as C. A. M. 32.

29. August 8, 1929, Varney Air Lines, Inc., submitted a proposal to the Second Assistant Postmaster General, by which it offered to carry United States mail by aircraft on Route C. A. M. 32, subject to the postal laws and regulations and the terms and conditions of the advertisement of June 15, 1929, at a rate of 9 cents per pound, and the Varney Air Lines, Inc., furnished to the Second Assistant Postmaster General with its proposal a bond in the penal sum of $100,000, executed by it as principal and Associated Indemnity Corporation as surety, and conditioned as required by postal laws and regulations.

30. The Postmaster General held and determined that Varney Air Lines, Inc., was the lowest responsible bidder, and on September 23, 1929, a contract was entered into between Varney Air Lines, Inc., as contractor, and the defendant, providing for the transportation of mail by aircraft on Route C. A. M. 32 by the contractor for a period not exceeding four years from the starting date specified by the Postmaster General, at a rate of compensation to be paid the contractor of 9 cents per pound. At or about the time of the execution of the contract of September 23, 1929, Varney Air Lines, Inc., as principal, furnished to the Postmaster General its performance bond in the penal sum of $1,000, executed by itself as principal, and Associated Indemnity Corporation as surety, and conditioned as required by postal laws and regulations, which bond was accepted and approved by the Postmaster General.

31. On or about September 15, 1929, Varney Air Lines, Inc., commenced the transportation of United States air mail on Route C. A. M. 32 and continued to carry on such transportation under the contract until July 1, 1930, when that route was consolidated with A. M. 5, as shown in Findings 34 and 35.

32. May 3, 1930, the Postmaster General, acting pursuant to an amendment to the Air Mail Act of February 2, 1925, known as the McNary-Watres Act, approved April 29, 1930, executed and issued to Walter T. Varney an air-mail route certificate for the transportation of air mail on Route C. A. M.

5, thereafter known as A. M. 5, between Salt Lake City and Pasco, Washington, until April 5, 1936. May 3, 1930, Walter T. Varney, surrendered to the Postmaster General his contract of November 7, 1925, in exchange for that air-mail route certificate, and accepted the air-mail route certificate of May 3, 1930, in writing. At or about the time of the execution of that air-mail route certificate, Walter T. Varney executed and delivered to the Postmaster General his performance bond in the penal sum of $12,000, conditioned as required by postal laws and regulations, and deposited with the Postmaster General as security thereunder $12,000 face value United States of America Liberty Loan bonds, which bond and deposit were accepted and approved by the Postmaster General. The route certificate of May 3, 1930, was in general terms similar to the route certificate issued to Pacific Air Transport and set out in Finding 8.

33. The Postmaster General in issuing the route certificate of May 3, 1930, found that the original contract of November 7, 1925, was duly entered into between Walter T. Varney and the defendant; that the contract of November 7, 1925, had been extended pursuant to the terms thereof for a period of six months and was presently in full force and effect; that Walter T. Varney had satisfactorily operated Route C. A. M. 5 for a period of not less than two years, namely, from April 6, 1926; and that in the judgment of the Postmaster General the public interest would be promoted by the issuance of the route certificate to Walter T. Varney in substitution for his air-mail contract.

34. May 27, 1930, the Postmaster General executed an order consolidating Route A. M. 5 and Route C. A. M. 32, effective July 1, 1930, which read as follows:

> The route certificate issued to Walter T. Varney for service over A. M. 5, and sublet to Varney Air Lines (Inc.), is hereby referred to and, whereas in the judgment of the Postmaster General the public interest will be promoted thereby, the two above-mentioned routes are consolidated in accordance with the provisions of the act approved April 29, 1930. The contract for C. A. M. 32, with the consent of the contractor, is therefore canceled and the route consolidated with A. M. 5, effective July 1, 1930.

> The carrier is stated as Walter T. Varney, of San Francisco, Calif., and permission is granted to sublet the consolidated route effective July 1, 1930, to Varney Air Lines (Inc.), Balboa Building, San Francisco, Calif., the terms and conditions as set forth in the certificate issued on May 3, 1930, for A. M. 5, to prevail, and the rates of pay to be stated in a subsequent order.

Pursuant thereto the route certificate of May 3, 1930, was sublet by Walter T. Varney to Varney Air Lines, Inc., on July 1, 1930. When the order of May 27, 1930, set out above, was entered, Route A. M. 5 and Route C. A. M. 32, which connected at Pasco, were commonly owned and operated by Varney Air Lines, Inc., as heretofore shown. The rates of pay per mile for the consolidated route ranged from 58 cents to 98 cents on July 1, 1930, and from 43 cents to 45 cents in 1933.

35. July 1, 1930, the Postmaster General entered into an agreement with Walter T. Varney reading as follows:

> Now, wherefore, acting in accordance with the provisions contained in the act approved April 29, 1930, and whereas in the judgment of the Postmaster General the public interests will be promoted thereby, and having received an application from Walter T. Varney, certificate holder on route A. M. 5, and from Varney Air Lines (Inc.), by Louis H. Mueller, president, contractor on route C. A. M. 32, praying for the consolidation of these two routes;
>
> Therefore, the route certificate issued to Walter T. Varney under date of May 3, 1930, for service from Elko, Nev. (Salt Lake City, Utah), by way of Boise, Idaho, to Pasco, Wash., and return, is hereby referred to and the aforementioned routes are consolidated into one route, effective July 1, 1930, to be hereafter known as A. M. 5, Salt Lake City, Utah, to Seattle, Wash., and return, with such extensions or other consolidations as may hereafter be provided, the terms and conditions of the route certificate herein mentioned to apply to the consolidated route with full force and effect, unless otherwise ordered.

Varney Air Lines, Inc., accepted the terms and conditions of the agreement of July 1, 1930, and surrendered to the Postmaster General its air-mail contract of September 23, 1929. July 1, 1930, Walter T. Varney executed and delivered

to the Postmaster General his performance bond for that route certificate, as amended, in the penal sum of $12,000, conditioned as required by postal laws and regulations, and deposited with the Postmaster General as security thereunder $12,000 face value United States of America Liberty Loan bonds, which bond and deposit were accepted and approved by the Postmaster General. Payments for service on the route after consolidation are set out in Finding 139.

36. The Postmaster General and Walter T. Varney, by Varney Air Lines, Inc., entered into an agreement amending the route certificate of May 3, 1930, so as to provide in paragraph 16 thereof that by agreement of the Postmaster General and the carrier, the life of the certificate could be curtailed, the certificate canceled, or any other modification made therein, including extensions in the life thereof not inconsistent with law. The amendment was similar to that set out in Finding 10. It was executed by the Postmaster General February 24, 1933, and accepted by Walter T. Varney by Varney Air Lines, Inc., on March 7, 1933.

37. September 30, 1933, the air-mail route certificate of May 3, 1930, as amended, providing for the transportation of air mail on Route A. M. 5, as consolidated, was sublet to Boeing Air Transport, Inc. The Postmaster General consented in writing to the execution of that subcontract and on October 9, 1933, entered an order terminating the recognition of Varney Air Lines, Inc., as subcontractor on Route A. M. 5, effective September 30, 1933, and recognizing Boeing Air Transport, Inc., as subcontractor on Route A. M. 5, as consolidated, from October 1, 1933, to April 5, 1936, at the route certificate rate of pay. October 9, 1933, the Postmaster General entered an order authorizing air-mail transportation on Route A. M. 5, as consolidated, to be performed by Boeing Air Transport, Inc., effective October 1, 1933. Boeing Air Transport, Inc., acquired all the physical properties of Varney Air Lines, Inc., as of September 30, 1933, and transported air mail on Route A. M. 5, as consolidated, under the terms of the route certificate from October 1, 1933, until February 19, 1934.

38. The route certificate of May 3, 1930, and an order entered by the Department on the same date, effective May

5, 1930, described the schedules, departure times, termini, stops, mileage, space-weight reservations and the rate of compensation per mile; and modifications with respect thereto were made from time to time thereafter by some seventeen orders issued by the Post Office Department.

United Air Lines Transport Corporation, No. 43032

39. United Air Lines Transport Corporation is a corporation organized and existing under the laws of the State of Delaware, and since on or about December 28, 1934, has been engaged in the business of transporting mail, passengers, and express by aircraft.

40. December 28, 1934, United Air Lines Transport Corporation, United Air Lines, Inc., National Air Transport, Inc., and Varney Air Lines, all being corporations organized and existing under the laws of the State of Delaware, were merged and consolidated under the provisions of the General Corporation Law of the State of Delaware into United Air Lines Transport Corporation. By reason of such merger and consolidation, United Air Lines Transport Corporation acquired ownership of all properties, assets, contracts, claims and causes of action of the merged and consolidated corporations, including the ownership of any and all claims and causes of action of National Air Transport, Inc., against the defendant and the right to enforce the same by actions in the Court of Claims of the United States.

41. Prior to that merger and consolidation of December 28, 1934, National Air Transport, Inc., was a corporation organized and existing under the laws of the State of Delaware. It was engaged in the business of transporting mail, passengers, and express by aircraft from September 1, 1927, until February 19, 1934, and thereafter was engaged in the business of transporting passengers and express by aircraft until on or about May 1, 1934.

42. March 8, 1927, the Postmaster General advertised for bids for carrying United States mail by aircraft from New York via Cleveland, Ohio, to Chicago, Illinois, and return, under the conditions stated in the advertisement. National Air Transport, Inc., submitted a bid at a rate of $1.24 per pound for mail loads up to 1,500 pounds, each calendar day,

irrespective of destination on that route, with decreases in the rate for increased poundage based on a sliding scale set forth in the advertisement. That bid was accepted and on April 2, 1927, a contract was duly entered into between National Air Transport, Inc., and the defendant pursuant to the advertisement and bid for a period not exceeding four years from the starting date specified by the Postmaster General. That route was known as C. A. M. 17.

43. The Postmaster General designated September 1, 1927, as the date on which performance was to commence on Route C. A. M. 17 under the contract of April 2, 1927, and on September 1, 1927, National Air Transport, Inc., commenced the transportation of United States air mail on that route and continued to carry on such transportation until February 19, 1934, with such variations in arrangements and conditions as hereinafter appear.

44. October 22, 1930, the Postmaster General, acting pursuant to an amendment to the Air Mail Act of February 2, 1925, known as the McNary-Watres Act, approved April 29, 1930, executed and issued to National Air Transport, Inc., an air-mail route certificate for the transportation of air mail on Route C. A. M. 17, thereafter known as A. M. 17, between Chicago, Illinois, and New York, N. Y., until April 5, 1936. October 22, 1930, National Air Transport, Inc., surrendered to the Postmaster General its contract of April 2, 1927, in exchange for that air-mail route certificate and accepted that air-mail route certificate of October 22, 1930, in writing. At or about the time of the execution of that air-mail route certificate, National Air Transport, Inc., furnished to the Postmaster General a performance bond in the penal sum of $251,000, executed by it as principal, and by National Surety Co. as surety, and conditioned as required by postal laws and regulations, which bond was accepted and approved by the Postmaster General. That route certificate was in general terms similar to the route certificate issued to Pacific Air Transport and set out in Finding 8.

45. The Postmaster General in issuing the route certificate of October 22, 1930, found that the original contract of April 2, 1927, was duly entered into between National Air Transport, Inc., and the defendant; that the contract

of April 2, 1927, was in full force and effect; that National Air Transport, Inc., had satisfactorily operated Route C. A. M. 17 for a period of not less than two years from September 1, 1927; and that in the judgment of the Postmaster General the public interest would be promoted by the issuance of the route certificate to National Air Transport, Inc., in substitution for its air-mail contract.

The Postmaster General and the National Air Transport, Inc., entered into an agreement amending the route certificate of October 22, 1930, so as to provide in paragraph 17 thereof that by agreement of the Postmaster General and the carrier, the life of the certificate could be curtailed, the certificate canceled, or any other modifications made therein, including extensions in the life thereof not inconsistent with law. The amendment was similar to that set out in Finding 10. It was executed by the Postmaster General February 24, 1933, and accepted by the National Air Transport, Inc., March 6, 1933.

46. The route certificate of October 22, 1930, and an order of the Post Office Department entered October 28, 1930, effective November 1, 1930, prescribed the schedules, departure times, termini, stops, mileage, space-weight reservations and the rate of compensation; and modifications with respect thereto were made from time to time thereafter by some fourteen orders issued by the Post Office Department.

United Air Lines Transport Corporation, No. 43033

47. United Air Lines Transport Corporation, plaintiff in No. 43033, is the same corporation described in Findings 39 and 40. National Air Transport, Inc., referred to in No. 43033, is the same corporation described in Findings 40 and 41.

48. July 15, 1925, the Postmaster General advertised for bids for carrying United States mail by aircraft from Chicago, Illinois, to Dallas and Fort Worth, Texas, via certain designated points, and return, under conditions stated in the advertisement. National Air Transport, Inc., submitted a bid at a rate of four-fifths of the postage revenue to be derived from such air mail. That bid was accepted and on

November 7, 1925, a contract was duly entered into between National Air Transport, Inc., and the defendant pursuant to the advertisement and bid for an indefinite period subject to the statutory limitation of four years. That route was known as C. A. M. 3.

49. The Postmaster General designated May 12, 1926, as the date on which performance was to commence on Route C. A. M. 3 under the contract of November 7, 1925, and on May 12, 1926, National Air Transport, Inc., commenced the transportation of United States air mail on that route and continued to carry on such transportation until February 19, 1934, with such variations in arrangements and conditions as hereinafter appear.

50. Pursuant to an amendment to the Air Mail Act of February 2, 1925, approved June 3, 1926, an amendatory agreement, relating to Route C. A. M. 3, was entered into between National Air Transport, Inc., and the defendant, on June 20, 1926, under the terms of which the rate of compensation to be paid to National Air Transport, Inc., for the transportation of air mail on Route C. A. M. 3 was fixed at $3.00 per pound, including equipment.

51. November 6, 1929, the Postmaster General, by order, extended the contract of November 7, 1925, for a period not to exceed six months, the order granting such extension stating that the contract was "continued in force for a period not to exceed six months, under authority of paragraph 2, section 1356, Postal Laws and Regulations."

52. May 3, 1930, the Postmaster General, acting pursuant to an amendment to the Air Mail Act of February 2, 1925, known as the McNary-Watres Act, approved April 29, 1930, executed and issued to National Air Transport, Inc., an air-mail route certificate for the transportation of air mail on Route C. A. M. 3, thereafter known as A. M. 3, between Chicago, Illinois, and Dallas and Fort Worth, Texas, until April 5, 1936. May 3, 1930, National Air Transport, Inc., surrendered to the Postmaster General its contract of November 7, 1925, in exchange for that air-mail route certificate, and accepted such air-mail route certificate of May 3, 1930, in writing. At or about the time of the execution of that air-mail route certificate, National Air Transport, Inc., executed

and delivered to the Postmaster General its performance bond in the penal sum of $2,000, conditioned as required by postal laws and regulations, and deposited with the Postmaster General as security thereunder $2,000 face value United States of America Fourth Liberty Loan bonds. National Air Transport, Inc., also executed and delivered to the Postmaster General a certificate providing that the Liberty Loan bonds previously deposited with the Department under the performance bond for the air-mail contract of November 7, 1925, could be held by the Postmaster General as further security for performance under its air-mail route certificate of May 3, 1930. The performance bond and deposit were accepted and approved by the Postmaster General. That route certificate was in general terms similar to the route certificate issued to Pacific Air Transport and set out in Finding 8.

53. The Postmaster General in issuing the route certificate of May 3, 1930, found that the original contract of November 7, 1925, had been duly entered into between National Air Transport and the defendant; that the contract of November 7, 1925, had been extended pursuant to the terms thereof for a period not to exceed six months and was presently in force and effect; that National Air Transport, Inc., had satisfactorily operated Route C. A. M. 3 for a period of not less than two years from May 12, 1926; and that in the judgment of the Postmaster General the public interest would be promoted by the issuance of the route certificate to National Air Transport, Inc., in substitution for its air-mail contract.

The Postmaster General and the National Air Transport, Inc., entered into an agreement amending the route certificate of May 3, 1930, so as to provide in paragraph 16 thereof that by agreement of the Postmaster General and the carrier the life of the certificate could be curtailed, the certificate canceled, or any other modifications made therein, including extensions in the life thereof not inconsistent with law. The amendment was similar to that set out in Finding 10. It was executed by the Postmaster General February 24, 1933, and accepted by the National Air Transport, Inc., March 6, 1933.

54. The route certificate of May 3, 1930, and an order of the Post Office Department of the same date, effective May 5, 1930, prescribed the schedules, departure times, termini, stops, mileage, space-weight reservations, and the rate of compensation per mile; and modifications with respect thereto were made from time to time thereafter by some twenty-six orders issued by the Post Office Department.

General Findings Relating to Nos. 43029 to 43033, inclusive

55. For some four or five years prior to 1916 demonstrations of airplane mail service had been made from time to time by individuals who, with the Post Office Department, recognized the possibilities of carrying mail in that manner. In 1912 the Post Office Department asked Congress for an appropriation to start an experimental service but that request and subsequent requests were refused until 1916 when certain funds were made available. However, no bids were received in response to the advertisements for bids for the contemplated service for the reason that bidders were unable to obtain suitably constructed planes for such service.

For the fiscal year ended June 30, 1918, Congress made an appropriation of $100,000 for an experimental air-mail route and on May 15, 1918, the first air-mail route in the United States was established, namely, between New York, N. Y., and Washington, D. C., by the Post Office Department with the cooperation of the War Department, the latter furnishing planes and pilots and conducting the flying and maintenance operations and the former handling the mail and matters relating thereto, and that arrangement continued until August 12, 1918, when the Post Office Department took over the entire operation of the route.

The Post Office Department continued its operations of air-mail service from 1918 to about August 31, 1927, during which time the total length of routes increased from 218 miles to 5,551. These operations were undertaken and continued by the Post Office Department for the purpose of demonstrating the practicability of commercial aviation as a fast means of transportation both for carrying the mail and for other purposes with the view of encouraging private

enterprise to enter the field and take over the operation of the air-mail service under contractual arrangements. That purpose had been accomplished at the time of the relinquishment of service in 1927, and even prior to that time, as appears in these findings, Congressional action had been taken and contracts had been let in carrying out that purpose.

56. February 2, 1925, Congress enacted an act entitled "An Act to encourage commercial aviation and to authorize the Postmaster General to contract for air-mail service" (43 Stat. 805), which read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the Air Mail Act.
>
> SEC. 2. That when used in this Act the term "air mail" means first-class mail prepaid at the rates of postage herein prescribed.
>
> SEC. 3. That the rates of postage on air mail shall be not less than 10 cents for each ounce or fraction thereof.
>
> SEC. 4. That the Postmaster General is authorized to contract with any individual, firm, or corporation for the transportation of air mail by aircraft between such points as he may designate at a rate not to exceed four-fifths of the revenues derived from such air mail, and to further contract for the transportation by aircraft of first-class mail other than air mail at a rate not to exceed four-fifths of the revenues derived from such first-class mail.
>
> SEC. 5. That the Postmaster General may make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act: *Provided*, That nothing in this Act shall be construed to interfere with the postage charged or to be charged on Government operated air-mail routes.

During 1925, after the passage of the above act, the Post Office Department availed itself of the provisions of that act by advertising for bids for the service on various routes and under the advertisements for bids on eight routes, which were receivable on September 15, 1925, nineteen bids were received, resulting in the awarding of contracts on all but three of the routes. The original contracts heretofore described in Nos. 43029, 43031, and 43033, which were exchanged for the air-mail route certificates sued upon in these proceedings, were entered into with the defendant pursuant to the Air Mail Act of February 2, 1925. The original contracts

heretofore described in Nos. 43030 and 43032, which were exchanged for the route certificates sued upon in these proceedings, were entered into with the defendant pursuant to the Air Mail Act of February 2, 1925, as amended June 3, 1926. All of the foregoing contracts were made after competitive bidding.

57. After the inauguration of contract air-mail service, it became apparent that the compensation measured by a percentage of postage revenue derived from the route involved required checking and calculating, which led to confusion and delay in the handling of mail. Because of that objection, the Air Mail Act of February 2, 1925, was amended by an act approved June 3, 1926 (44 Stat. 692), authorizing payment for the transportation of air mail at fixed rates per pound, including equipment, not exceeding $3.00 per pound for the first 1,000 miles or fractional part thereof and not exceeding 30 cents per pound additional for each additional 100 miles or fraction thereof. The amendatory act further provided that existing contracts could be amended by the written consent of the contractor and the Postmaster General to provide for a fixed rate per pound to be determined by multiplying the new statutory maximum rates by a fraction having as a numerator the percentage of revenues to which the contractor was entitled under his contract and a denominator of eighty.

58. The Air Mail Act of February 2, 1925, as amended June 3, 1926, was further amended by an act approved May 17, 1928 (45 Stat. 594), hereinafter sometimes referred to as the "Kelly Amendment," which read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 3 of the Air Mail Act of February 2, 1925 (United States Code, Title 39, section 463), as amended by the Act of June 3, 1926, is hereby amended to read as follows:
>
> "SEC. 3. That the rates of postage on air mail shall not be less than 5 cents for each ounce or fraction thereof."
>
> SEC. 2. That after section 5 of said Act (United States Code, Title 39, section 465) a new section shall be added as follows:
>
> "SEC. 6. That the Postmaster General may by negotiation with an air mail contractor who has satisfac-

torily operated under the authority of this Act for a period of two years or more, arrange, with the consent of the surety for the contractor and the continuation of the obligation of the surety during the existence or life of the certificate provided for hereinafter, for the surrender of the contract and the substitution therefor of an air-mail route certificate, which shall be issued by the Postmaster General in the name of such air mail contractor, and which shall provide that the holder shall have the right of carriage of air mail over the route set out in the certificate so long as he complies with such rules, regulations, and orders as shall from time to time be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting air mail operations to the advances in the art of flying: *Provided*, That such certificate shall be for a period not exceeding ten years from the beginning of carrying mail under the contract. Said certificate may be canceled at any time for willful neglect on the part of the holder to carry out such rules, regulations, or orders; notice of such intended cancellation to be given in writing by the Postmaster General and sixty days provided to the holder in which to answer such written notice of the Postmaster General. The rate of compensation to the holder of such an air-mail route certificate shall be determined by periodical negotiation between the certificate holder and the Postmaster General, but shall never exceed the rate of compensation provided for in the original contract of the air mail route certificate holder."

The two principal changes thus made by the Kelly Amendment were a provision for a reduction in the postage rate and a provision for the issuance of route certificates. The House Committee report accompanying the Kelly Amendment contains the following explanation of the route certificate section:

> Section 6 is a new provision of law which is necessary because of the fact that concerns which engage in contracts for carrying air mail must necessarily invest large amounts of capital in equipment and operating expenses without receiving an adequate return under a short-term contract. Under present law no contract can be made for a period longer than four years. The effect of section 6, if enacted into law, would be to make possible the extension of the contract to a period not to exceed 10 years from the beginning of carrying mail under the contract, at the option of the Postmaster General, if the

service rendered by the contractor had proved satisfactory for a period of two years or more under the contract.

59. With respect to the first provision, the Postmaster General in office at the time of the passage of the Kelly Amendment reduced the air-mail postage rate on August 1, 1928, to 5 cents for the first ounce and 10 cents for the second and subsequent ounces, such action being taken pursuant to that amendment. This reduction in rate resulted in a very substantial increase in air-mail traffic, the amount of such mail dispatched in July 1928, being 214,558 pounds and in August 1928, 419,047 pounds.

60. At the time of the passage of the Kelly Amendment, a substantial number of air-mail contracts, including two contracts with plaintiffs and involved in these proceedings, were eligible to have route certificates issued therefor under that amendment. By or before the passage of the McNary-Watres Act of April 29, 1930, a similar situation had arisen with respect to other contracts, including the other three contracts of plaintiffs involved in these proceedings. However, no route certificates were issued by the Post Office Department pursuant to the Kelly Amendment.

61. The reasons for no route certificates having been issued under the Kelly Amendment during the period from its passage until March 4, 1929, by the Postmaster General then in office are not shown by the record. Early in the administration of Postmaster General Brown, who was Postmaster General from March 4, 1929, to March 4, 1933, and who will be referred to as the Postmaster General with respect to certain events occurring during that period, the air-mail situation was brought to his attention and throughout his administration he took an active interest in, and made the decisions with respect to, the more important matters concerning air mail rather than leaving such decisions to subordinates. As early as May 1929, he expressed to a meeting of air-mail operators his concern about the cost to the Government of the air-mail service, and stated that some readjustment must be made, offering as one suggestion that payment should be made on a mileage basis with a space

limitation rather than on a poundage basis as provided by statute at that time. All of the air-mail contracts which had been let up to that time had been awarded through the medium of competitive bidding and the rates of pay thereunder varied greatly, the variation being as great as from 62½ cents per pound to approximately the maximum provided by existing law of $3.00 per pound. Some of the contractors were operating at a small profit and others at a loss.

62. Up to about the time of the passage of the McNary-Watres Act on April 29, 1930, some air-mail operators were also engaged in carrying passengers, but only to a minor extent, and the others were unwilling or at least reluctant to carry passengers. They depended for their income almost entirely on mail revenues. There were also at that time a substantial number of air passenger lines of varying lengths which did not have air-mail contracts and most if not all of them were finding it extremely difficult to sustain themselves on passenger revenues. Many such lines were in a bad financial condition. Some of the companies in both classes (air-mail and passenger) had been promoted through sales of stock without a sound financial set-up and with inadequate resources, while others were financed, either directly or indirectly, with ample resources and were logically planned and well operated.

63. During the first six or eight months after coming into office on March 4, 1929, the Postmaster General became familiar with the situations and conditions referred to in Findings 61 and 62, both from the Post Office Department and from air-mail and passenger operators who were in frequent correspondence and consultation with him as to their problems.

A question heretofore referred to came up for early consideration, namely, the action which should be taken under the Kelly Amendment with respect to the issuance of route certificates. In the fall of 1929, the Postmaster General had meetings with the air-mail operators on this question. At or about the same time notification was given to one or two of the plaintiffs to appear in connection with the consideration of the issuance of route certificates under

contracts held by them and involved in these proceedings. However, no route certificates were issued for the reason, among others, that the Postmaster General was of the opinion that the Kelly Amendment did not provide a proper solution of some of the important air-mail problems. He indicated his dissatisfaction with the provision in the Kelly Amendment under which a route certificate would be issued for ten years and would require that any modifications of the terms of the certificate during that period could be made only if the contractor agreed to such modifications. He took the position that it should be possible for the Post Office Department to make adjustments in rates, which adjustments were in its opinion proper, even though the contractor was unwilling, after negotiations, to acquiesce in the adjustment. He further objected to the provision in the Kelly Amendment which limited adjustments in rates to a reduction and would not permit an increase over the rate set out in the contract in exchange for which the route certificate was issued, because such a limitation precluded giving what he considered needed relief to operators who had bid for and made contracts at rates which were too low for profitable operation.

At that time the Postmaster General was further of the opinion that the Department should have the power to require air-mail operators to carry passengers and in that way supplement their air-mail revenues and thereby increase the possibilities for a reduction in air-mail rates of pay. He felt that under a route certificate issued pursuant to the Kelly Amendment he could not require an operator to carry passengers and, as heretofore stated, most of them were unwilling to do so.

In addition, the Postmaster General objected to the statutory method of measuring compensation by pounds, irrespective of distance, unless in excess of 1,000 miles on a given route, and contended that this method often produced excessive costs both to the Government and to the users of air mail, resulted in undesirable inequality in pay and led to unethical practices by the contractors in some cases where the contract rate per pound exceeded the postage rate per pound. From an early period in his administration, Post-

master General Brown favored a space-mileage, instead of a poundage, basis of pay, and at least from the time of a meeting with the operators in September or October 1929 efforts were being made by the Post Office Department and the operators to set up a rate scale or yardstick which might be used in determining fair compensation for air-mail services, but these efforts were unsuccessful.

64. In addition to what he considered vices in the Kelly Amendment and the basic air-mail law, the Postmaster General was desirous of aiding commercial aviation and felt that the existing statutes were inadequate for that purpose. In that connection he had before him the problem of the passenger-carrying air operators who were finding their passenger revenues inadequate to meet expenses and who were asking for assistance in the form of air-mail revenue. Some of these passenger-carrying lines paralleled existing air-mail lines.

65. In this period during the fall of 1929 and continuing into 1930 the Postmaster General was also considering the question of what he considered the illogical growth of the air-mail service with its numerous short lines and few long lines some of which lines of both kinds had been established without proper regard for their usefulness and expense. A part of this illogical growth had resulted from pressure brought to bear on the Post Office Department by individuals and organizations and by members of Congress from particular areas without regard to the cost of such service as compared with the postal revenue to be derived therefrom.

The Postmaster General took the position that there should be developed a revised air-mail map for the United States which would either eliminate some of the short lines or effect their consolidation with longer lines, make extensions of other lines and provide a coordinated system for the entire country, with preference being given generally to the establishment of longer lines than then existed.

66. At least some of the criticisms heretofore referred to as having been made by the Postmaster General of the existing air-mail statutes and suggestions for changes therein were made by him on December 9, 1929, to the Appropriations Committee of the Congress when a post office appro-

priation bill was under consideration. He referred to the effort which was being made to establish a yardstick or measure of reasonable compensation for air-mail service, the desirability of changing from the poundage to the space-mileage basis for payment and the advantage which would be gained by consolidations and extensions of existing routes.

These and other criticisms and suggestions were also discussed with air-mail and passenger operators, including representatives of most, if not all, of plaintiffs and efforts were made to agree upon corrective legislation which might be recommended to Congress.

When these matters were discussed with the Appropriations Committee, the Postmaster General stated that he was preparing recommendations for revised legislation along the lines discussed by him, and members of the Committee evidenced interest therein, suggested that such recommendations be sent to Congress as soon as possible, and stated that they would cooperate in enacting legislation for the purpose of improving the existing air-mail situation.

67. With the cooperation of representatives of air-mail and passenger operators, the Postmaster General prepared and sent to Congress a bill which was designated as H. R. 9500 and which was introduced in the House of Representatives on February 4, 1930. It read as follows:

> A Bill to amend the Air Mail Act of February 2, 1925, as amended by the Acts of June 3, 1926, and May 17, 1928, further to encourage commercial aviation by authorizing the Postmaster General to establish air mail routes.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Air Mail Act of February 2, 1925, as amended by the Act of June 3, 1926, and the Act of May 17, 1928 (Thirty-ninth United States Code 461, and the following), be amended to read as follows:
>
> "SEC. 2. That mailable matter of any description may be transported by aircraft; and that the term 'air mail' when used in this Act means any mail upon which air-mail postage is prepaid authorized by the Postmaster General to be carried by aircraft under such regulations as he may prescribe.
>
> "SEC. 3. The rates of postage on air mail shall be prescribed by the Postmaster General: *Provided*, That

the rate on air mail of the first class shall not be less than 5 cents for each ounce or fraction thereof: *And provided further*, That whenever space contracted for as in section 4 hereof provided is not required for the transportation of air mail, the Postmaster General, under such regulations as he may prescribe, may permit the utilization of such space for the transportation of any other mail matter he may authorize to be so transported.

"SEC. 4. The Postmaster General is authorized to award contracts for the transportation of mail by aircraft between such points as he may designate to the lowest responsible bidders at fixed rates per mile for definite weight spaces, such rates not to exceed $1.25 per mile: *Provided*, That when in his opinion the public interests shall so require, he may award such contracts by negotiation and without advertising for or considering bids. In awarding air-mail contracts the Postmaster General will give proper consideration to the equities of air mail and other aircraft operators with respect to the routes which they have been operating and the territories which they have been serving.

"SEC. 5. The Postmaster General may, if in his judgment the public interest will be promoted thereby, upon the surrender of any air-mail contract, issue in substitution therefor a route certificate for a period of not exceeding ten years from the date service started under such contract to any contractor or subcontractor who has satisfactorily operated an air-mail route for a period of not less than two years, which certificate shall provide that the holder thereof shall have the right, so long as he complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operations to the advances in the art of flying, to carry air mail over the route set out in the certificate or any modification thereof at rates of compensation to be fixed from time to time by the Postmaster General: *Provided*, That such rates shall not exceed $1.25 per mile. Such certificate may be canceled at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be canceled.

"SEC. 6. The Postmaster General in establishing air-mail routes under this Act may, when in his judgment the public interest will be promoted thereby, make any

extensions or consolidations of routes which are now or may hereafter be established.

"SEC. 7. That the Postmaster General in establishing routes for the transportation of mail by aircraft under this Act may provide service to Canada or Mexico, over domestic routes which are now or may hereafter be established, and may authorize the carrying of either foreign or domestic mail, or both, to and from any points on such routes and make payment for services over such routes out of the appropriation for the domestic air mail service: *Provided*, That this section shall not be construed as repealing the authority given by the Act of March 2, 1929, to contract for foreign air mail service to these countries."

68. At the time H. R. 9500 was introduced in Congress the Postmaster General was of the opinion that competitive bidding was not the most desirable method of procuring the carrying of air mail, and that a more desirable method would be to leave the matter in the discretion of the Postmaster General in much the same manner in which he was permitted to enter into contracts with railway companies for the carrying of other mail, without advertising for bids therefor. That principle was included in the bill set out in Finding 67 in section 4 under the proviso to the effect that "when in his [the Postmaster General's] opinion the public interests shall so require, he may award such contracts by negotiation and without advertising for or considering bids."

69. In considering the air-mail and aviation situation up to the time of H. R. 9500, the Postmaster General had become impressed with what he termed "equities" or "pioneering rights" of air-mail and other aircraft operators with respect to the routes which they had been operating and the territories which they had been serving. It was the Postmaster General's view that anybody who had spent money in the developing of a given territory, had created a good will, and had persuaded people to fly and support commercial aviation, ought to be given preferred consideration in the awarding of air-mail contracts.

One of the principal objects sought to be accomplished by the proviso and last sentence in section 4 of H. R. 9500 was to enable the Post Office Department to give aid to passenger-carrying operators. It was intended by the propo-

nents of that language that, in the awarding of contracts, recognition would be given to "pioneering rights" of existing operators of air lines.

70. The Postmaster General, the Second Assistant Postmaster General, who had charge of matters affecting air mail, and representatives of various air-mail operators and passenger-carrying lines appeared before the Committee on the Post Office and Post Roads in support of H. R. 9500.

In explaining its provisions, the Postmaster General gave as reasons, among others, for the change in this bill to the space-mileage basis of payment in lieu of the poundage basis in existing law, that there was a great lack of uniformity of compensation paid the contractors on the poundage basis and that the poundage basis created an inducement to the contractor to increase the volume of mail by unethical practices. He then referred to what he considered the illogical air-mail map which had grown up without proper regard to its need and stated that there were some lines that had no real excuse for existence and others that could be greatly improved by slight additions. He stated that in his opinion it was not possible under the certificate plan in existing law to make the extensions desired for the reason that he was limited to extensions under existing contracts. He further stated that the limitation in existing law of the amount to be paid might also prove a barrier to extensions for the reason that some extensions might involve a distance greater than the original line. He referred to equities or pioneering rights which he thought the Government ought to recognize in the awarding of air-mail contracts.

In discussing the attempts which had been made in conferences between him and the operators to agree upon a uniform basis of compensation for all operators, one member of the committee stated that under the existing system the yardstick was a matter for each individual route based on competitive bidding. In answer to that suggestion, the Postmaster General stated that competitive bidding in the air-mail business was of doubtful value and more or less a myth because of the limited number of prospective responsible bidders on a given operation.

The Postmaster General stated that he considered it very important to give aid to passenger-carrying lines which did not have mail contracts at that time and which were in need of financial assistance, and that he would undertake to accomplish this under the proposed bill by contracting with these carriers for certain space in their planes without competitive bidding.

In discussing the proviso in section 4 of the proposed bill with respect to the awarding of contracts by negotiation and without advertising for or considering bids, the Postmaster General suggested that this matter be considered very carefully because it involved a departure from the time-honored policy of our country. He gave as one of his reasons for the desirability of such a provision that it would provide a means for the Post Office Department to protect itself against irresponsible bidders and would protect the equities of existing air-mail operators who had spent considerable money in the development of a given route. In commenting on this proviso the Postmaster General stated "we thought it was necessary in section 4 to provide for the cases of essential air-mail routes that are not now being served and for the passenger-mail routes that are not being served. We believed that there were equities there that ought to be observed and that we would be better off if we could pick our man in the present state of the art rather than to submit the result to competitive bidding." Opposition to the departure from competitive bidding was indicated by Representative Kelly, who was of the opinion that contracts for carrying air mail should continue to be awarded by competitive bidding rather than by negotiation as proposed in H. R 9500.

The Postmaster General stated that the air-mail contractors and other persons interested had been consulted about the proposed bill and that all were agreed that it was the next logical step in air-mail legislation. Representatives of the more important air-mail and passenger-carrying lines spoke in support of the bill, including representatives of the air-mail contractors who had the contracts which are involved in these proceedings.

71. March 24, 1930, the Committee on the Post Office and Post Roads reported H. R. 9500 favorably with only minor changes. Section 4 was changed by striking out the word "fixed" in the fourth line thereof and the words "per mile for definite weight spaces, such rates" in the fourth and fifth lines, and by substituting the word "may" for the word "will" in the last sentence of the section. However, a minority report was filed by two members of the committee in which opposition was expressed to the bill on the ground that it authorized the Postmaster General to award contracts by negotiation without advertising for or considering bids. After the proposed bill as reported by the Committee had been reported and placed on the calendar for action, the Speaker of the House advised the Postmaster General that regardless of the favorable committee report which had been made on the bill he did not believe it would be possible to secure its enactment without material amendments to meet the objections of Representative Kelly and suggested that he meet with the Steering Committee to discuss the matter. The Postmaster General met with that committee. As a result of their discussions a revised bill was prepared by the Steering Committee which was sent to the Committee on the Post Office and Post Roads, where it was approved, reported to the House, and passed. Later the Senate adopted the bill substantially as thus revised, and it was approved by the President April 29, 1930. This act became known as the McNary-Watres Act (46 Stat. 259) and read as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 4 of the Air Mail Act of February 2, 1925, as amended by the Act of June 3, 1926 (44 Stat. 692; U. S. C., Supp. III, title 39, sec. 464), be amended to read as follows:
>
> "SEC. 4. The Postmaster General is authorized to award contracts for the transportation of air mail by aircraft between such points as he may designate to the lowest responsible bidder at fixed rates per mile for definite weight spaces, one cubic foot of space being computed as the equivalent of nine pounds of air mail, such rates not to exceed $1.25 per mile: *Provided*, That where the air mail moving between the designated points does not exceed twenty-five cubic feet, or two

hundred and twenty-five pounds, per trip the Postmaster General may award to the lowest responsible bidder, who has owned and operated an air transportation service on a fixed daily schedule over a distance of not less than two hundred and fifty miles and for a period of not less than six months prior to the advertisement for bids, a contract at a rate not to exceed 40 cents per mile for a weight space of twenty-five cubic feet, or two hundred and twenty-five pounds. Whenever sufficient air mail is not available, first-class mail matter may be added to make up the maximum load specified in such contract."

SEC. 2. That section 6 of the Act of May 17, 1928 (45 Stat. 594; U. S. C., Supp. III, title 39, (sec. 465c), be amended to read as follows:

"SEC. 6. The Postmaster General may, if in his judgment the public interest will be promoted thereby, upon the surrender of any air-mail contract, issue in substitution therefor a route certificate for a period of not exceeding ten years from the date service started under such contract to any contractor or subcontractor who has satisfactorily operated an air-mail route for a period of not less than two years, which certificate shall provide that the holder thereof shall have the right, so long as he complies with all rules, regulations, and orders that may be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting mail operations to the advances in the art of flying and passenger transportation, to carry air mail over the route set out in the certificate or any modification thereof at rates of compensation to be fixed from time to time, at least annually, by the Postmaster General, and he shall publish in his annual report his reasons for the continuance or the modification of any rates: *Provided*, That such rates shall not exceed $1.25 per mile. Such certificate may be canceled at any time for willful neglect on the part of the holder to carry out any rules, regulations, or orders made for his guidance, notice of such intended cancellation to be given in writing by the Postmaster General and forty-five days allowed the holder in which to show cause why the certificate should not be canceled."

SEC. 3. That after section 6 of the said Act as amended, additional sections shall be added as follows:

"SEC. 7. The Postmaster General, when in his judgment the public interest will be promoted thereby, may make any extensions or consolidations of routes which are now or may hereafter be established.

"SEC. 8. That the Postmaster General in establishing routes for the transportation of mail by aircraft under this Act may provide service to Canada within one hundred and fifty miles of the international boundary line, over domestic routes which are now or may hereafter be established and may authorize the carrying of either foreign or domestic mail, or both, to and from any points on such routes and make payment for services over such routes out of the appropriation for the domestic air-mail service: *Provided*, That this section shall not be construed as repealing the authority given by the Act of March 2, 1929, to contract for foreign air-mail service.

"SEC. 9. After July 1, 1931, the Postmaster General shall not enter into contracts for the transportation of air mail between points which have not theretofore had such service unless the contract air-mail appropriation proposed to be obligated therewith is sufficient to care for such contracts, and all other obligations against such appropriation, without incurring a deficiency therein."

72. As will appear from a comparison of the bill as proposed in **H. R.** 9500 and the act as finally enacted, the principal changes made were to eliminate the proviso in section 4 which would have authorized the Postmaster General to award contracts by negotiation and without advertising for or considering bids, to eliminate the provision for giving consideration to the equities of air mail and other aircraft operators in the awarding of air-mail contracts, and to substitute therefor the language set out above in the bill. Section 5 which became section 6 in the act as finally enacted was not materially changed, except for the addition of the words "and passenger transportation" which were added at the request of the Postmaster General for the reason that he considered such words necessary in order to permit him when issuing route certificates to require that the recipients thereof make provision to carry passengers as well as air mail.

73. In the meantime, as heretofore shown, consideration had been given in the fall of 1929 to the issuance of route certificates under the Kelly Amendment and the decision had been reached by the Postmaster General, after conferences with air-mail operators, including representatives of plaintiffs, not to issue route certificates under the Kelly

Amendment at that time but in lieu thereof to seek new or amendatory legislation which would meet what have previously been referred to as objections to the existing law and the needs for improvement therein. At or about the same time the Postmaster General, with the cooperation of the air-mail operators, was seeking to work out a yardstick which would provide a uniform basis for payment of air-mail carrying operations and was also preparing and taking an active part in securing the enactment of new legislation, which culminated in the enactment of the McNary-Watres Act, as described in Finding 71.

74. During the period of the foregoing activity, the expiration date was being reached in the case of various air-mail contracts entered into in 1925 and 1926 for a four-year period. In order that these contracts might not expire but might survive to be dealt with under the proposed new legislation which it was hoped would be enacted within a short period, the Postmaster General extended these contracts for a period of six months from their respective expiration dates. Included among the contracts so extended were three of the contracts involved in these proceedings, such extensions being described in Findings 6, 27, and 51.

75. When it appeared possible that the new air-mail legislation referred to above might not be enacted prior to the expiration of some of the extensions referred to in the preceding finding, the Post Office Department, on April 11, 1930, advertised for bids for the transportation of mail on those routes, including the routes of plaintiffs as mentioned in Findings 27 and 51, where the expiration of the extensions was May 6, 1930. The advertisements stated that bids would be received until April 28, 1930, that the successful bidders would be expected to begin operations upon the award of the contracts and not later than May 6, 1930, that the term of the contracts would be two months, and that the right was reserved to withdraw the advertisements on or before April 28, 1930. When the advertisements were issued, the Postmaster General announced that he reserved the right to withdraw the advertisements or reject any and all bids in the event the pending air-mail legislation was passed by Congress prior to May 5, 1930. In connection

with the issuance of the advertisements, the Postmaster General advised a representative of the plaintiff companies that the advertising for these bids was not an unfriendly act on the part of the Post Office Department.

These advertisements were issued for the purpose of securing short-term contracts over these routes pending the enactment of the new proposed air-mail legislation and with the expectation that the bidders who would qualify thereunder would be the air-mail operators who were then operating on these routes. Prior to May 5, 1930, the pending legislation (McNary-Watres Act) was, as hereinbefore shown, passed by Congress and approved by the President April 29, 1930. Accordingly, no contracts were awarded under the advertisements. In lieu thereof, route certificates were immediately issued on May 3, 1930, to the operators concerned, under the provisions of the McNary-Watres Act, those issued to the plaintiff companies being as shown in Findings 32 and 52.

76. With the passage of the McNary-Watres Bill, discussions began among the several parties who might be affected thereby, including the Postmaster General and other officials of the Post Office Department and the air-mail and passenger-carrying operators, as to its meaning and how it would affect their activities. Some of those concerned were disappointed over the failure of Congress to pass H. R. 9500, or to include in the bill as enacted provisions similar to certain desired provisions proposed in H. R. 9500. One group particularly concerned was the passenger-carrying operators who had no air-mail contracts, many of whom were having difficulty continuing in existence without the benefit of such contracts. The Postmaster General had previously indicated his desire to aid them through the new legislation which he was urging. Questions began to be raised as to whether relief would come to passenger-carrying operators through the McNary-Watres Bill as enacted, and as to the general scope and effect of that act, and suggestions were made to the Postmaster General that at least some of the relief for passenger-carrying operators contemplated by H. R. 9500 might be accomplished under the McNary-Watres Bill by granting extensions to existing air-mail lines and

arranging to have those extensions sublet by air-mail operators to passenger-carrying operators.

As heretofore shown, as the result of objections raised in Congress to the provision in H. R. 9500 which would have permitted the Postmaster General to award contracts by negotiation without competitive bidding, that provision was eliminated from the bill (McNary-Watres) as finally enacted as well as the provision pertaining to a consideration of the equities or pioneering rights of operators in awarding contracts. One of the principal purposes of these proposed but rejected provisions had been to enable the Postmaster General to give aid to passenger-carrying operators.

77. In view of the situation which arose after the passage of the McNary-Watres Act, as shown in Finding 76, and particularly because of the continued requests which were being received by the Postmaster General from the passenger-carrying operators for assistance, the Postmaster General on May 15, 1930, instructed the Second Assistant Postmaster General, W. Irving Glover, to invite certain air-mail and passenger-carrying operators to meet with him in conference at the Post Office Department on May 19, 1930. Pursuant to those instructions, Mr. Glover wrote a memorandum to Earl W. Wadsworth, Superintendent of Air Mail, which read in part as follows:

> The Postmaster General is desirous of having a conference with representatives of the Companies mentioned below; by this, I mean a substantial representative like Wheat for the United Aircraft; Hanshue, Western Air, and Maddux of the T. A. T. He sees the feeling that is developing among the passenger-carrying lines who have no mail contract and have no way of getting into the picture unless it is by competitive bidding, and he wants to have a meeting with these representatives on next Monday, May 19th, at two p. m. in his office, and desires to have a talk with them along the lines of just the best way for them to approach the question of giving aid to passenger lines. In other words, he wants them to come to some understanding so that it will not all be thrown into the pot and the passenger-line operators left entirely outside due to the fact that the air-mail operators would have the inside and would have the territory covered.

The Companies he desires at this meeting are as follows:

United Aircraft Corporation.
Aviation Corporation of America.
Western Air.
T. A. T.-Maddux.
Eastern Air Transport.
Stout Lines.

* * * * *

The Postmaster General desires to hold up the awarding of any more certificates, if possible, until after this meeting.

78. Mr. Wadsworth complied with Mr. Glover's instructions and on May 19, 1930, representatives of air-mail and passenger-carrying operators, including those invited and others, met in the Post Office Department with Postmaster General Brown, Assistant Postmaster General Glover, and the Superintendent of Air Mail, Mr. Wadsworth. At the conclusion of the conference on that day, Mr. Wadsworth prepared the following memorandum of what occurred at the conference:

The Postmaster General invited representatives of passenger air lines to meet with him in conference at 2 p. m., on May 19, for the purpose of discussing the provisions of the Watres' Bill insofar as it offered aid to the passenger lines.

The following persons were present: Messrs. Russel, Hanshue, Wooley, and Bishop, of Western Air Express; Messrs. Mayo and Peterson, of Stout Air Lines; Messrs. Maddux, Sheaffer, Cuthel, and Furlow, of T. A. T. Maddux Air Lines; Messrs. Coburn and Hinshaw, of Aviation Corporation; Messrs. Wheat and Johnson, of United Aircraft Corporation; Messrs. Doe and Elliott, of Eastern Air Transport; Mr. Henderson, of National Air Transport; Messrs. Marshall and Denning, of Thompson Aeronautical Corp.; Messrs. Robbins and Hahn, of Pittsburgh Aviation Industries; Mr. Van Zant; Mr. Lou Holland, of U. S. Air Transport; Mr. Ted Clark, representing Earle Halliburton; and Lawrence King from Detroit.

The Postmaster General opened the meeting by discussing the general provisions of the Watres' Bill and invited suggestions from those present as to the ways and means of assisting the passenger operators, inasmuch as it is understood none of the so-called strictly

passenger lines are breaking even and it is apparent that they will need some assistance if they are to continue. The P. M. G. expressed the desire to know whether it is going to be possible for the so-called pioneers to agree among themselves as to the territory in which they shall have the paramount interest. He outlined certain prospective routes that were in contemplation somewhat as follows: a Southern Transcontinental route from Los Angeles to San Diego, thence to Fort Worth and Dallas; also a route from New York to St. Louis and Kansas City and Los Angeles; from St. Louis to Tulsa and Fort Worth; from St. Paul to Winnipeg; possibly from St. Paul and Minneapolis to Omaha; possibly a route south from Cheyenne, and possibly one from Albany to Boston. He referred to the plan mentioned below.

Col. Henderson said: "I believe it is quite possible for this group to work out a plan." He asked for instructions from the P. M. G. as to some policy. He mentioned extensions and then assigning such extensions to some operator who has no air-mail contract. He indicated the air-mail contractors would be willing to agree to such a plan.

Mr. Maddux feels that if they do not receive an air-mail contract they could not live and he hoped the Bill would take care of this. He would rather see the plan worked out as mentioned above than competitive bidding. He said that is the view of T. A. T.

Mr. Mayo said: "I think the suggestion is a good one, rather than to have competitive bidding." He thinks the rates we have worked out with the contractors on their certificates are fair, etc.

Mr. Clark said: "I would prefer the plan suggested rather than competitive bidding."

Mr. Lou Holland said: "I think it should be worked out by agreement, as I am afraid that competitive bidding will result in wild promotions."

Mr. Hanshue: "We are willing to do anything within reason to work out the plan rather than to go into competitive bidding."

Mr. Coburn: "I believe there is a community of interests among the operators and the Department and they are ready to cooperate and find out how to do it."

Mr. Wheat: "I feel sure the entire group would be delighted to go into such a conference and work it out along the lines suggested."

The Postmaster General asked everyone to speak if there were any objections to the plan suggested and said

> that this was the appropriate time to express their opinions or objections thereto. No one arose in objection to the plan.
>
> Mr. McCracken suggested grouping the representatives together according to locality, in order to work out the details of the plan, or any other plan that might be gotten up, suggesting they might even have four committees, or an eastern and a western committee.
>
> Col. Henderson thinks those who have air-mail contracts should be organized into one committee and those who have no air-mail contracts be organized into another committee.
>
> Mr. Cuthel suggested that certain members of this group present to the Postmaster General a grouping of companies to deal with the southern and midcontinent transcontinental routes.
>
> The P. M. G. decided to permit the operators to use the room in which the meeting was held for the purpose of organizing themselves into such groups as may be decided upon and to report back to the P. M. G. when they had reached a conclusion with regard to the suggested plan. He suggested that they stick to the routes outlined.

On the same day the Post Office Department issued the following press release:

> In order to acquaint themselves with the provisions of the Watres bill, recently made a law through the signature of President Hoover, representatives of every large passenger and air-mail-carrying concern throughout the country conferred today with Postmaster General Brown, Assistant Postmaster General Glover, and other officials of the Department in charge of the Air Mail Service. This is the first time that operators of the large passenger lines have had an opportunity to talk with the Postmaster General and exchange views with him since the Watres measure became a law.
>
> A general discussion of air-mail and passenger-carrying business, together with prospects for their future development, took place at today's meeting. The Postmaster General explained to those who attended the conference the limitations placed on him under the terms of the Watres Act, which fixed the maximum that can be paid for carrying the mails to $1.25 a mile and a charge of 40 cents a mile for each passenger transported.

> Before the close of today's session it was agreed that the operators present should prepare a map of the United States, which will show in detail plans for a network of passenger and air-mail routes to cover the country and which will be determined at future conferences with the Postmaster General.
>
> The companies represented at today's conference were: Western Air Express, Aviation Corporation, National Air Transport, Thompson Aeronautical Corporation, Pittsburgh Aviation Industries, Ford Co., United States Air Lines, Earl Haliburton, United Aircraft Corporation, Curtiss-Wright, Transcontinental Air Transport, and Eastern Air Express.

The statements by Mr. Wadsworth in his memorandum did not purport to cover all that occurred on that day. They were a summarization by him, based on stenographic notes taken by him of what transpired at the meeting. His quotations of the various individuals did not include all that was said by them on that occasion.

79. In his discussion at the conference on May 19, 1930, referred to in the preceding finding, the Postmaster General expressed his disappointment at the failure of Congress to enact H. R. 9500 as proposed, which would have enabled him to have given aid to passenger-carrying lines through an authorization to negotiate mail contracts with them and explained what had occurred in Congress which caused the rejection of certain provisions of H. R. 9500 and the substitution of the McNary-Watres Act quoted in Finding 71 for H. R. 9500. The Postmaster General said that upon the enactment of the McNary-Watres Act he was at first of the opinion that the contemplated aid to passenger-carrying lines, as proposed under H. R. 9500, could not be given but after a careful reading of the Act, he had concluded, consistent with certain suggestions made to him by representatives of some of the passenger-carrying lines, that substantial relief could be given to the passenger-carrying lines through the provision in the McNary-Watres Act which authorized him to make extension or consolidations of existing air-mail routes or such routes which might thereafter be established. He said he was of the opinion that a liberal interpretation of that provision would permit him to extend geographically

certain lines of established air-mail routes and then arrange for those contractors who received these extensions to sublet them to passenger lines which had no air-mail contracts.

The Postmaster General further stated that under the McNary-Watres Act he wanted to create a national network of air-mail and passenger service and that in such a service long lines should be created in place of, and in addition to, the existing network which contained many short, illogical lines and which had only one transcontinental line. He expressed his desire to have created one or more additional east-west transcontinental lines and lines in a north-south direction which would serve all sections of the country.

The Postmaster General stated that in creating such a national network of air-mail service, he favored independent competing lines for the transcontinental service, that is, lines which did not have a common ownership and which did not have any financial or corporate relationship with each other. He also stated that he desired to have only one operator on a given line, that is, not having two or more operators paralleling each other, but that he realized much pioneering work had been done by more than one operator in the same territory with the consequent expenditure of money and that in working out mergers or consolidations, or in making extensions and then having those extensions sublet to another contractor, recognition should be given to the equity or pioneering interests of the several parties concerned.

80. The Postmaster General exhibited to the operators a map of the United States which he had had prepared showing the existing air-mail routes as well as those which he was tentatively presenting as routes which might be established in order to form a desired national network of air-mail service. The routes proposed to be established had been set up on the basis of various suggestions, requests, and recommendations which had been received from time to time by the Post Office Department from cities, towns, chambers of commerce, and others interested therein. Prior to the conference there had existed an interdepartmental committee composed of three representatives from the Post Office Department and three representatives from the Department of

Commerce which had for its purpose consideration of and recommendations on requests for air-mail service, and at least some of the routes suggested by the Postmaster General to the operators at the conference of May 19, 1930 had received prior consideration by the interdepartmental committee.

The Postmaster General in substance and effect asked the operators to consider the routes which he had outlined to be established for additional air-mail service and see whether they could agree among themselves as to who should receive recognition for the performance of the service on those routes through the method of extension and subletting heretofore mentioned. In determining who should receive recognition to perform the service on a given route or in a given territory, the operators were asked to see if they could agree among themselves what particular operator ought in fairness to perform the service in that area because of the pioneering work which he had done in building up good will for aviation in that area and investments which in fairness entitled him to recognition. In seeking to have the operators agree on a given operator who was to perform the service for a particular extension it was expected by the Postmaster General that in the event of such an agreement he could, if he chose, give the extension to the operator agreed upon without objection from other operators who might have some claim for consideration on that route.

As part of the same plan of creating the network by extensions and sublettings, the Postmaster General said he was hopeful that the operators would work out among themselves mergers and consolidations which would give recognition to the rights of all parties on a given route and at the same time would reduce the number of operators on a given route to one and thereby make it possible to have only one operator with whom he would have to deal in making the extension or providing for service in a given area.

81. While the record is not clear as to whether the Postmaster General specifically mentioned that he desired to create the network without advertising for contracts and having competitive bidding, the method outlined by the Postmaster General and considered by the parties at the

conference contemplated its substantial accomplishment without competitive bidding through the extension of existing contracts, or contracts thereafter to be established, and then having an extension so made operated by either the operator whose line had been extended, or through the subletting of the extension to such other contractor as might be determined upon, and through mergers or consolidations. In that conference the establishing of new routes through extensions and, where necessary, sublettings, rather than by competitive bidding, was being considered, even in the case of a transcontinental route from Atlanta to Los Angeles, where the proposal was being made that an extension could be made from Atlanta westward and by other extensions for that route.

The Postmaster General gave no assurance to the operators at the conference that he would follow the recommendations made by them or consider himself bound in any way thereby but did state that he desired suggestions and recommendations as to whether they could agree on the operator who should perform the service in a given area and that he would give most careful consideration to their suggestions and recommendations.

82. While the operators who were called upon by the Postmaster General at the conference to comment on the plan outlined by him indicated a general willingness to cooperate and some spoke of the desirability of working out a plan which would avoid competitive bidding in the creation of the proposed network, some of the operators expressed among themselves, although not openly to the Postmaster General, their doubt as to the legality of carrying out such a plan along the lines indicated by the Postmaster General. Col. Paul Henderson, plaintiffs' representative as hereinafter shown, expressed doubt as to the propriety of the plan, meaning thereby, as he testified, that the plan went "way and beyond the ideas that were in the minds of the men who passed the law."

83. At the conclusion of his remarks, the Postmaster General suggested that the operators form a committee or committees who might consider the plan and suggestions outlined by him and undertake to agree upon recommendations

which they might make to him as to the operator or operators who in their judgment should perform the air-mail service on a given line or in a given area, and offered to them the use of the room where they were meeting in the Post Office Department for the purpose of holding their meetings. In accordance with that suggestion the operators met and elected as chairman of the meeting Mr. William P. MacCracken who at that time represented, among other operators, the Transcontinental Air Transport Corporation.

84. Plaintiffs were represented at the conference by Philip G. Johnson, president and a director of Pacific Air Transport and Boeing Air Transport, Inc., and vice president and a director of United Aircraft & Transport Corporation; Col. Paul Henderson, vice president, general manager, and director of National Air Transport, Inc., and a director of Varney Air Lines; G. S. Wheat, vice president of United Aircraft & Transport Corporation; R. W. Ireland, traffic manager of United Aircraft & Transport Corporation; and J. P. Murray, eastern representative of Boeing Airplane Company, a subsidiary of United Aircraft & Transport Corporation.

Col. Paul Henderson, referred to above, had been Assistant Postmaster General from 1922 until July 31, 1925, when he resigned and on August 1, 1925 became general manager of National Air Transport, Inc. In 1928 he became vice president and general manager of Transcontinental Air Transport Corporation, which corporation then owned the controlling interest in National Air Transport, Inc. He held that office until the controlling interest in the latter corporation was acquired by the United Aircraft & Transport Corporation in April 1930. At the latter time he resigned from his offices with Transcontinental Air Transport Corporation and became vice president and general manager of National Air Transport, Inc., on April 20, 1930. March 18, 1931, he became a vice president of United Aircraft & Transport Corporation. Through his offices in the National Air Transport, Inc., and United Aircraft & Transport Corporation and other companies in the United group, he continued his active connection with the United group until April 13, 1934. In May 1930, and thereafter, Mr. Philip G. Johnson

was superior in rank and authority in the United group of companies to Colonel Henderson.

85. At the time of the conference of May 19, 1930, heretofore referred to, the United Aircraft & Transport Corporation, which was organized October 30, 1928, under the name of Boeing Airplane & Transport Corporation, owned the entire capital stock of Boeing Air Transport, Inc., and a controlling interest in Pacific Air Transport and National Air Transport, Inc., the controlling interest in the last-named corporation having been acquired shortly prior to that time. The United Aircraft & Transport Corporation acquired substantially all the stock of the Varney Lines, Inc., in August 1930, and in May 1930, was negotiating for its purchase. At the conference the corporations just mentioned were referred to as members of the "United" group and will hereinafter sometimes be referred to by that designation. The United Aircraft & Transport Corporation continued to hold the stock of the foregoing companies until its dissolution August 31, 1934, as shown in Finding 130.

86. In the conference of the operators, the routes referred to on the map submitted by the Postmaster General were made the basis of the operators' consideration of the proposal outlined by the Postmaster General. The routes, twelve in number, were numbered consecutively from one to twelve as follows:

Route No. 1. Los Angeles to Atlanta via San Diego, El Paso, and Dallas.
Route No. 2. Los Angeles to New York via Albuquerque, Amarillo, Kansas City, St. Louis, Columbus, Pittsburgh, and Philadelphia.
Route No. 3. Omaha to St. Paul and Winnipeg.
Route No. 4. Albany to Boston.
Route No. 5. Pittsburgh to Washington and Norfolk.
Route No. 6. Louisville to Dallas.
Route No. 7. Denver to Kansas City.
Route No. 8. Pueblo to Fort Worth and Dallas.
Route No. 9. Pueblo to El Paso via Albuquerque.
Route No. 10. Amarillo to St. Louis via Oklahoma City and Tulsa.
Route No. 11. Great Falls to Lethbridge.
Route No. 12. Seattle to Vancouver.

The meeting of the operators proceeded by having the chairman call the list of routes for the purpose of permitting each person present to indicate his interest in or claim for a given route. At this initial conference claims for consideration were made as follows:

Route No. 1. Los Angeles to Atlanta via San Diego, El Paso, and Dallas:
- Aviation Corporation.
- Western Air Express.
- Eastern Air Transport Corp.
- Southwest Air Fast Express, Inc. (Erle P. Halliburton).

Route No. 2. Los Angeles to New York via Albuquerque, Amarillo, Kansas City, St. Louis, Columbus, Pittsburgh, and Philadelphia:
- United.
- Transcontinental Air Transport.
- Western Air Express, Inc. (interested in route from Los Angeles to Kansas City).
- Aviation Corporation (interested in route from Kansas City to New York City).
- Pittsburgh Aviation Industries Corp. (interested in route from St. Louis to New York City).
- Eastern Air Transport, Inc. (interested in route from Columbus to New York City).
- Clifford Ball (interested in route from St. Louis to New York City).
- Southwest Air Fast Express, Inc. (Halliburton) (interested in route west of St. Louis).

Route No. 3. Omaha to St. Paul and Winnipeg:
- Northwest Airways, Inc.
- United (interested in route from Omaha to St. Paul).
- Aviation Corporation.

Route No. 4. Albany to Boston:
- Aviation Corporation.
- United.

Route No. 5. Pittsburgh to Washington and Norfolk:
- Eastern Air Transport Corp.
- Transcontinental Air Transport.
- Pittsburgh Aviation Industries Corp.
- Clifford Ball.

Route No. 6. Louisville to Dallas:
United.
Aviation Corporation.
Western Air Express, Inc.
Southwest Air Fast Express, Inc. (Halliburton).
Route No. 7. Denver to Kansas City:
United States Airways, Inc.
Route No. 8. Pueblo to Fort Worth and Dallas:
United.
Aviation Corporation.
Western Air Express, Inc.
Route No. 9. Pueblo to El Paso via Albuquerque:
Western Air Express, Inc.
Route No. 10. Amarillo to St. Louis via Oklahoma City and Tulsa:
United.
Aviation Corporation.
Western Air Express, Inc.
Transcontinental Air Transport.
Southwest Air Fast Express, Inc. (Halliburton).
Route No. 11. Great Falls to Lethbridge:
National Park Airways, Inc.
Route No. 12. Seattle to Vancouver:
United.

87. The conference which began on May 19, 1930, with the statements or remarks by the Postmaster General shown in Findings 78, 79, 80, and 81, was followed thereafter by meetings of the operators which continued from time to time until June 4, 1930. During that period three or more of the meetings were held in the Post Office Department and others were held in private offices outside the Post Office Department. No representative from the Post Office Department was present at these meetings other than the opening meeting of May 19, 1930, and the concluding meeting of June 4, 1930. At the meetings during the intervening period, various discussions were had among the parties in an effort to arrive at a recommendation to the Postmaster General as to who, in their opinion, should conduct the air-mail service on the several routes outlined by the Postmaster General. Claims and counterclaims were presented based on alleged qualifications to operate over a given route, pioneering rights in a given area through pioneering work done therein and investments made,

and many other considerations. The issuance of route certificates was not discussed at these meetings.

As shown in the preceding finding, representatives of the United group, which included the plaintiffs in these suits, made claims on seven of the twelve routes. These claims were presented by Col. Paul Henderson who, prior thereto, had questioned the propriety of proceeding in the manner suggested by the Postmaster General as being contrary to the intent of Congress in enacting the McNary-Watres Act. After the first two or three meetings, Colonel Henderson withdrew all claims made for the United group except that on Route No. 12 (Seattle to Vancouver), such withdrawals being made on instructions from Mr. Philip G. Johnson, who was a superior in rank of Colonel Henderson in the United group.

Representatives of the United group attended all meetings of the operators which were held in the Post Office Department, but that group did not have a representative at most of the meetings held outside the Post Office Department. The representatives did, however, remain in Washington until after the conclusion of the last meeting on June 4, 1930, and kept in close touch with what was taking place which might affect the interests of the United system, which, at that time, was the strongest aviation system in the United States. It operated the only transcontinental system, that between New York City and San Francisco, which was made up of the National Air Transport, Inc., operation from New York City to Chicago and the Boeing Air Transport, Inc., operation from Chicago to San Francisco. The United system also included the Pacific Air Transport operation from Seattle to Los Angeles and the National Air Transport, Inc., operation from Chicago to Dallas. At that time all the corporations just mentioned were, as heretofore shown, operating under air-mail contracts or route certificates issued for air-mail contracts, and the same was true of the Varney Lines, Inc., substantially all of whose stock was acquired by the United Aircraft & Transport Corporation in August 1930, such purchase resulting from negotiations which were being carried on in May 1930.

88. Prior to the beginning of the conference of May 19, 1930, the United group had actively opposed the establishing

of additional transcontinental systems for the carrying of mail on the ground that their creation was not then justified and particularly because these additional lines would take business from their existing line from New York through Chicago to San Francisco. However, by the time of the conference, the representatives of United recognized that the Postmaster General had determined to establish additional transcontinental lines as a part of a national network for the Air Mail Service and that these lines should be separately owned and competitively operated. They did not then or thereafter actively oppose the creation of the additional transcontinental lines. Their attitude became more that of an acceptance of the fact that the lines would be created and of an endeavor not to antagonize the Postmaster General through actions contrary to his expressed desire, while at the same time protecting their own interests, including protection as far as possible from competition, and cooperating with the Postmaster General and the operators insofar as not unduly inconsistent with their own interests. A good statement of the attitude assumed by the United group and the results of such attitude was summarized by Mr. Philip G. Johnson, a vice president of the United Aircraft & Transport Corporation, to the president of that corporation when the former made a report to the latter on August 3, 1931, of a conference which he had had with a representative of another aviation company, such report reading in part as follows: "* * * Also, we pointed out that United Air Lines at no time during the past two years of negotiations had ever by any act on their part, political or otherwise, sought to embarrass the other air lines who were being bailed out by the Post Office Department in order that they might survive—that this attitude on our part had helped them get mail contracts entirely across the country and the letting of such air-mail contracts had resulted in our paying the bill by decreased mail pay, and that after all of the negotiations were over, the only additional thing that United actually had was the 120-mile extension from Los Angeles to San Diego—that nearly all the other companies were flying many more airway miles per day and getting paid for it than they had in their entire existence up to the time of the negotiations."

89. In addition to the United group, the other more important aviation corporations in existence in May 1930 were the following: Aviation Corporation, which owned the stock of various subsidiary aviation companies; Transcontinental Air Transport, which was operating a combined rail and air route from New York to Los Angeles; Western Air Express, which operated between Los Angeles and Salt Lake City and between Los Angeles and Kansas City; and Eastern Air Transport, which operated between New York City and Atlanta. The smaller lines then in existence were the Northwest Airways, Inc., which operated between Chicago, Minneapolis, and St. Paul; Southwest Air Fast Express, Inc., which operated principally in the southwest and central western area; United States Airways, Inc., which operated between Kansas City and Denver; Delta Air Lines, which operated between Atlanta and Fort Worth; and other companies which operated short lines in various parts of the country. All of the larger operators, both air mail and passenger, and some, though not all, of the smaller operators were represented during the conference heretofore referred to which began May 19, 1930, and continued to June 4, 1930.

In addition to the meetings of the operators as a group which were had from time to time between May 19 and June 4, 1930, other discussions or conferences were had between individual operators. One of these conferences was had in the Mayflower Hotel about May 19 or 20, 1930, between representatives of United and Aviation Corporation, when the former proposed to the latter that United might be interested in exchanging the part of the National Air Transport operation south of Kansas City for a line of Aviation Corporation from Cleveland to Albany. A representative of the Southwest Air Fast Express, Inc., a corporation controlled by Erle P. Halliburton, was also present at that conference. The proposal was made not only because of the benefit which United might derive from making such an exchange but also in furtherance of the effort which was then being made to agree upon a recommendation to the Postmaster General in accordance with his statement to the operators on May 19, 1930. One purpose in the latter connection was to assist in providing an operation which could be recommended to the Postmaster General for operation by the Southwest Air

Fast Express, Inc. That corporation was not looked upon with favor by the Postmaster General as a desirable and responsible air-mail operator but its controlling stockholder, Halliburton, was most persistent in his efforts to secure an air-mail contract for his corporation, and the Postmaster General desired, as the representatives of the United knew, to attempt to appease Halliburton by giving him some contract.

The proposal of the representative of United for the exchange was reported to the group of operators and is referred to in the report which is set out in the next succeeding finding. The proposal, however, was rejected by the Aviation Corporation and was never carried out.

90. June 4, 1930, the air transport operators submitted a report to the Postmaster General which read as follows:

> Pursuant to your invitation, representatives of the air transport operators met on Monday, May 19th, to formulate recommendations for the extension of the air mail service, with a view to the participation in this service of air-transport operators now engaged exclusively in passenger and express service.
>
> This committee has held numerous sessions during the time which has intervened since the first meeting, and a list of those in attendance at one or more of these sessions is hereto attached.
>
> The committee also submits with this report a map indicating its recommendations; as well as the problems which remain unsolved.
>
> The committee has made a study of twelve routes, and has agreed upon recommendations as to seven of these; while as to the remaining five there are still some matters in controversy.
>
> Recommendations:
>
> No. 3. Omaha to St. Paul and Winnipeg:
> Northwest Airways—now flying entire route.
>
> No. 4. Albany to Boston:
> Aviation Corporation.
>
> No. 7. Denver to Kansas City:
> United States Airways, Inc.—now flying route.
>
> No. 8. Pueblo to Fort Worth and Dallas:
> Western Air Express—now flying route.

Recommendations—Continued.

No. 9. Pueblo to El Paso:

Western Air Express—now flying route.

No. 11. Great Falls to Lethbridge [Canada]:

National Parks Airways—only party in interest.

No. 12. Seattle to Vancouver:

United—first schedule; Varney Air Lines—second schedule.

Routes which are still the subject of negotiation:

No. 5. Pittsburgh to Washington and Norfolk:

Final terms not yet arranged.

No. 1. Los Angeles, San Diego, El Paso, Dallas to Atlanta.

No. 6. Dallas to Louisville:

Atlanta to Dallas:

Eastern Air Transport and Delta Air Service.

Louisville to Dallas:

Aviation Corporation and Curtiss Flying Service.

Los Angeles, San Diego, El Paso to Dallas:

Western Air Express and Aviation Corporation.

No. 2. Los Angeles, Albuquerque, Kansas City, St. Louis, Columbus, Pittsburgh, Philadelphia, and New York.

No. 10. Amarillo, Oklahoma City, Tulsa, and St. Louis (Tulsa Cut-off):

Kansas City to New York:

Transcontinental Air Transport and Pittsburgh Aviation Industries.

Los Angeles to Kansas City, Amarillo, Oklahoma City, Tulsa to St. Louis:

Western Air Express and Transcontinental Air Transport.

Amarillo, Oklahoma City, Tulsa, and St. Louis Cut-off:

Western Air Express; Southwest Air Fast Express; Transcontinental Air Transport.

Because the line of N. A. T. (United) south of Kansas City seemed to stand in the way of a proper solution of several of our problems, United has suggested that it abandon its line south of Kansas City and take over

some other line of equal value; such line to be one that might be properly operated in connection with United's other lines. This would permit the clearing of the mid-Transcontinental of its N. A. T. contract between Wichita and Kansas City, and would open the N. A. T. line south of Kansas City and Wichita for proper disposition in harmony with the Postmaster General's ideas. The suggestion has been made that Southwest Air Fast Express might operate the service on C. A. M. 3 south of Wichita and south of Kansas City.

The operators interested in the routes under controversy, have all agreed to submit the issues to the Postmaster General, in the hope that a satisfactory solution may be reached. They request that an opportunity be afforded them to present their claims for consideration on the respective routes, in such manner and at such time as may be designated by the Postmaster General.

Those named on the list referred to in the report and present at one or more of the sessions of the operators, with possible minor exceptions, were as follows:

United:
Messrs. Henderson
Johnson
Wheat
Ireland
Murray

Transcontinental Air Transport:
Messrs. Scheaffer
Cuthell
Maddux
Furlow

Western Air Express:
Messrs. Hanshue
Woolley

Northwest Airways:
Messrs. Britten
Smith

National Parks Airways:
Mr. Frank

Varney Air Lines:
Mr. Mueller

Aviation Corporation:
Messrs. Coburn
Hinshaw

Southwest Air Fast Express:
Messrs. Halliburton
Mayo
Clark

Clifford Ball, Inc.:
Mr. Clifford Ball

Thompson Aeronautical:
Messrs. Marshall
Denning

United States Airways:
Messrs. Holland
Letson

Pittsburgh Aviation Industries:
Messrs. Robbins
Hann

Curtiss Flying Service:
Messrs. Russell
Wright

Delta Air Service:
Messrs. Moore
Woolman

Eastern Air Transport:
Messrs. Doe
Elliott
Ottley

91. When the report of June 4, 1930, was submitted, the Postmaster General indicated his disappointment that recommendations, showing agreement, had been made only with respect to shorter routes and routes about which little disagreement could arise as to the party having the paramount interest therein, whereas no agreement had been reached as to the longer and more controversial lines. A brief summary of what occurred when that report was submitted is set forth in a memorandum prepared at the time by Mr. Wadsworth, Superintendent of Air Mail, who was present at the conference. It was as follows:

> At 3:15 p. m. on June 4, the representatives of passenger air lines met in conference with the Postmaster General here in the Department.
>
> Mr. McCracken, who had been named as chairman of the operators' committee, presented to the Postmaster General a report together with a map indicating the result of the deliberations of these gentlemen.
>
> The Postmaster General stated he would carefully consider this report and that he would inform them of any results that might be reached. Thereupon, the Postmaster General, Mr. Glover and Mr. Wadsworth retired from the room to the office of the Postmaster General and the report was carefully read.
>
> After reading over the report several times, it was decided to submit to the Comptroller General the question of just how far the Department could go in granting extensions to existing routes. It was thought best to do this before we took any further action with reference to this matter. The Postmaster General indicated that he would take the matter up with the Comptroller General himself and seek to obtain a decision with regard thereto.
>
> In a short while Mr. Glover informally returned to the room where the operators were waiting and informed them that the Department was somewhat disappointed in their report, inasmuch as they had in effect "taken all the meat and left the bones." They were told, however, that the report would be carefully studied and any decisions reached would be indicated to them.
>
> As a result thereof, the operators indicated they were preparing a supplemental report and would submit the same.

The supplemental report referred to in that memorandum was submitted by the operators to the Postmaster General later on the same day and read as follows:

> The Committee has instructed me to advise you that the representatives of all of the parties involved in the controversies desire to submit these controversies to you as arbiter and agree to be bound by your decision.

92. July 9, 1930, the Postmaster General submitted to the Comptroller General the question whether under the extension provision of the McNary-Watres Act the Postmaster General was authorized to extend an air-mail route then being operated by the Northwest Airways, Inc., between Chicago and Minneapolis, a distance of 694 miles, from Minneapolis via Grand Forks to Winnipeg, Canada, a distance of approximately 445 miles, and from Minneapolis via Sioux Falls to Omaha, a distance of approximately 340 miles. The extensions submitted were considered illustrative of other extensions under contemplation by the Postmaster General at that time.

July 24, 1930, the Comptroller General replied to the request of the Postmaster General in a decision in which he held with certain qualifications that the extension from Minneapolis to Winnipeg might be justified under the statute but that the extension from Minneapolis to Omaha did not appear to come within the statute. In reaching that conclusion the Comptroller General stated in part as follows:

> No hard and fast rule may be laid down in advance for the determination of the question whether a proposed extension of an air-mail route—an improvement of an existing route "by slight additions"—may be made and competitive bidding eliminated, because the facts in each particular matter of proposed extension are for consideration and may vary in each case. It may be stated generally, however, that any extension of an established route must have as its basis the public need stipulated by the law as necessary to be found and determined by the Postmaster General, an immediate relationship to the basic project and existing service to be so extended, and such subordinate relationship to the existing route as to be merely an extension thereof rather than a major addition thereto. An added service to an existing contract cannot properly be classed as

an extension which would tend to overshadow or subordinate the route sought to be extended.

It appears that the Chicago-Minneapolis route has for its purpose the connection of transcontinental service in operation through Chicago with Minneapolis and contributory territory, territory wherein Minneapolis-St. Paul is the metropolis and approximate center. As stated, it is understood there is now no air-mail service to Minneapolis-St. Paul from the north; that by extending the existing route from Minneapolis to Winnipeg, there will be established direct air-mail service from Chicago to Winnipeg; that is, with the established transcontinental service between New York and San Francisco via Chicago. Such an extension from Minneapolis to Winnipeg would result in adding 445 miles to an established route of 664 miles and connect with a much longer transcontinental route. It would seem that such an extension would come within the limitations hereinbefore enumerated as necessarily applicable unless it be in fact contemplated to make the Winnipeg-Minneapolis route a part of a major project extending via Omaha, to points south and possibly to the Gulf.

The facts submitted do not seem to justify a like conclusion as to the proposed extension of the Chicago-Minneapolis route from Minneapolis to Omaha, which is on the established transcontinental route hereinbefore mentioned and has more direct air-mail connections with Chicago and points east or west than would obtain via Minneapolis. The prolongation of the Chicago-Minneapolis route, which is in a northwesterly direction, southwesterly to Omaha would not in fact be an extension of the existing route but rather the establishment of a new route and the same conclusion would apply to the Minneapolis-Winnipeg proposal in event it be intended as not in fact a part of the Chicago-Minneapolis route but a part of a much longer route to be operated from Winnipeg to Omaha or points beyond. By no process of reasoning could the establishment of an air-mail route from Winnipeg via Minneapolis to Omaha or points beyond be viewed as an extension of the Chicago-Minneapolis route. Something more, as hereinbefore indicated, than a point of contact with an air-mail line is necessary to justify a conclusion that the establishment of a route to new territory may be considered as an extension of an existing route permitting establishment of service without competitive bidding.

Answering your questions specifically, you are advised that unless there is intended the establishment and

operation of a new air-mail route from Winnipeg to Omaha or points beyond, the conclusion seems to be justified that the establishment of air-mail service from Minneapolis to Winnipeg may properly be viewed as an extension of the Chicago-Minneapolis route at rates not in excess of those now in effect on the existing service and in no event in excess of the maximum rates fixed by law if it be found and determined by the Postmaster General that the public interest will be promoted thereby. If it be the intention to establish a major air-mail route from Winnipeg to Omaha and possibly to points beyond via Minneapolis, the additional service from Minneapolis to Winnipeg cannot be viewed as an extension of the Chicago-Minneapolis route and in no event can the establishment of service from Minneapolis to Omaha be viewed as such an extension of the Chicago-Minneapolis route as may be let without opportunity for competitive proposals therefor.

93. In the meantime, in June and July 1930, negotiations were taking place among operators who were interested in providing air-mail service on the route referred to in Findings 86 and 90 as No. 1, that is, the proposed route from Atlanta to Los Angeles and hereinafter sometimes referred to as the southern transcontinental, and on the route referred to in the same Findings as No. 2, that is, the route from New York to Los Angeles and hereinafter sometimes referred to as the central transcontinental. Just when it was determined to establish those lines as through transcontinentals by advertising for bids therefor instead of the extension method does not clearly appear from the record other than it was made subsequent to June 4, 1930, and prior to the latter part of July 1930. During that period efforts were being made by the various parties interested in those routes to bring together those having interests therein in such a manner that in effect only one operator or related group of operators would remain who would be interested in securing the air-mail contracts on those routes.

On June 26, 1930, Henderson wrote a letter to Johnson, his superior, which read as follows:

I just sent a letter, of which the attached is a copy, to Fred Rentschler in New York. Strange as it may seem, it looks as though the PMG can get by the Controller General with this plan of his. After all, if

he can and does, I think probably it is the best thing that could happen. It will stabilize prices and stop much of this milling around that has been going on, and will make our rates on the New York-Chicago and Chicago-San Francisco lines less a target for criticism than they might be if they had to be compared to ridiculous rates which would of course result from bidding.

In the early part of these discussions the Postmaster General indicated to the Aviation Corporation his desire to have that corporation operate the southern transcontinental. One of the reasons assigned by the Postmaster General for having that done was that he was anxious to have a strong operator for each of the transcontinental routes, and was of the opinion that some of the operators who might bid on that route were not capable of conducting such an operation. The Postmaster General said, however, that what have been heretofore referred to as pioneering rights of operators along that line should be recognized and given consideration by the operating line absorbing all other operators along the route.

94. To carry out the Postmaster General's policy as expressed by him to the Aviation Corporation, the latter entered into negotiations with the Delta Air Lines, which operated between Atlanta and Dallas. As a result of these negotiations, Aviation entered into a written contract dated July 14, 1930, with Delta under which Delta was to increase its capital stock and a majority of its capital stock was to be acquired by Aviation Corporation, provided Delta by an arrangement with the Post Office Department became the subcontractor for an extension or extensions of air-mail contracts which would provide a route to be operated by Delta from Atlanta or Birmingham to Dallas or Fort Worth. However, at or about the time the negotiations were completed it was determined by the Post Office Department to establish the southern transcontinental by competitive bidding instead of by extensions. When it was learned that the competitive bidding method was to be followed and Aviation Corporation was arranging to submit a bid for the contract, Aviation Corporation assured Delta that the former would carry out an arrangement with the latter similar to the previous arrange-

ment in the event that Aviation Corporation was the successful bidder for the contract. After Aviation Corporation, under the joint arrangement with Southwest Air Fast Express, Inc., hereinafter referred to, had been awarded the contract for the southern transcontinental route, the Aviation Corporation acquired the assets of Delta.

95. In July 1930 the Aviation Corporation owned a substantial block of stock in Western Air Express, Inc., which operated west of Dallas and at that time Western Air Express and Transcontinental Air Transport were working on an arrangement to operate the middle transcontinental line. As previously shown, the Postmaster General had indicated his desire to have the three transcontinental lines independently and competitively owned. In completing arrangements for the operation of the southern transcontinental route, it accordingly became necessary for the Aviation Corporation to reach an understanding with Western Air Express with respect to the stock interest of the former with the latter. That was accomplished by an agreement or agreements dated August 23, 1930, under which a corporation which was to be formed (Transcontinental & Western Air, Inc.) would acquire the stock interest of Aviation Corporation in Western Air Express. A further part of the same negotiation was that certain facilities and equipment of Western Air Express, located on the southern transcontinental, were to be acquired by Aviation Corporation. In connection with any dispute as to their value, the parties agreed to refer the question to the Postmaster General and to abide by his decision thereon. The carrying out of these arrangements was conditioned upon an air-mail contract being awarded on the southern transcontinental route to the Aviation Corporation and Southwest Air Fast Express, Inc., on their joint bid. After the award of the contract on the joint bid, as hereinafter shown, the contractual arrangements just referred to were carried out, and at least in the case of the valuation of the stock acquired by Western Air Express from Aviation Corporation the Postmaster General acted as arbiter in determining the value of such stock.

A third operator having a substantial interest in operating the southern transcontinental was the Southwest Air Fast

Express, Inc. In furtherance of the Postmaster General's policy of having operators along the line absorbed and to take care of pioneering rights, as well as to cooperate fully with the Postmaster General, the Aviation Corporation, through a subsidiary, American Airways, Inc., entered into an agreement with Southwest Air Fast Express, Inc., dated August 23, 1930, under which a wholly owned subsidiary of Aviation Corporation, Robertson Aircraft Corporation, and Southwest Air Fast Express, Inc., would submit a joint bid for the southern transcontinental route, and if that bid was successful the two corporations would form an operating company, one-half of which was to be owned by each corporation. One requirement of the advertisement for bids was that the bidder on that route should have had at least six months night flying experience. Southwest Air Fast Express, Inc., did not have such requisite experience but the Robertson Aircraft Corporation met that requirement. The agreement further contained an option for a short time under which Aviation Corporation could acquire the interest of Southwest Air Fast Express, Inc., at a price fixed therefor, and, in the event that the option was not exercised by Aviation Corporation within that specified time, Southwest Air Fast Express would have a similar option for a like period. After a contract was awarded on the joint bid, as hereinafter shown, Aviation Corporation exercised the option and acquired the interest of Southwest Air Fast Express. The contract was thereafter sublet to American Airways, Inc., a subsidiary of Aviation Corporation.

96. Some of the assets of the Southwest Air Fast Express such as hangars and machine shops were not located in such a manner as to be useful in operating the southern transcontinental route, but were located in the area to be traversed by the middle transcontinental route, and Aviation Corporation took the position that, consistent with the Postmaster General's policy of having the operator on a given route absorb pioneering rights of others along that route, the Transcontinental and Western Air group, whose negotiations were then going forward to submit a bid on the middle transcontinental route, should agree to take over those assets and such an agreement was entered into conditioned upon Avia-

tion Corporation's subsidiary and Southwest Air Fast Express being the successful bidder for the southern transcontinental route. That agreement was also carried out.

The two principal operators interested in the middle transcontinental route from New York to Los Angeles were the Western Air Express and Transcontinental Air Transport, and the Postmaster General had indicated his desire to have those corporations bring their resources together in some way that would enable them to operate that route as a continuous operation. Shortly prior to the advertisement for bids for the middle transcontinental route, the two corporations entered into an agreement to cause a new corporation to be formed in which each corporation was to have an interest of 47½ percent and 5 percent of the stock was to be reserved for sale to the Pittsburgh Aviation Industries, Inc. The agreement was carried out through the formation of a corporation known as Transcontinental & Western Air, Inc., and the issuance of the stock to the parties in the manner indicated above upon the award of the contract on the central transcontinental on the joint bid of Western Air Express and Transcontinental Air Transport and the assignment of that contract to the Transcontinental & Western Air, Inc., as hereinafter shown.

97. August 2, 1930, the Post Office Department advertised for bids for the carrying of air mail on the southern and central transcontinental routes. Each of the advertisements contained the following provisions:

* * * * *

> The schedule to be adopted will require a continuous trip to be operated out of the terminal points, or as continuous as may be practicable, daily.
>
> The department reserves the right to increase or decrease the number of intermediate stops or the number of round trips per day or week, to change the termini of the route, to dispatch mail on any plane of the contractor flown over the route, to modify or change the schedule if the needs of the service demand and operating conditions will permit, and to change the rates of postage on air mail.
>
> The successful bidder to be prepared to commence service promptly upon the award of contract, and not later than 30 days therefrom.
>
> Bond required with bid, $250,000.

This advertisement is issued in accordance with authority contained in section 4 of the act approved April 29, 1930, reading as follows:

[Then followed section 4 of the act indicated.]

In order to meet the requirements of this advertisement, the bidder must submit one bid which will cover both of the above provisions of section 4, and same must be made on the form furnished by the department. Bids submitted will be stated at a percentage of the maximum amount of 40 cents a mile for furnishing 25 cubic feet of space to accommodate up to 225 pounds of mail, and of the maximum amount of 75 cents a mile plus full variables as set forth on page 2, for furnishing 47 cubic feet of space to accommodate up to 423 pounds of mail under the $1.25 provision of the law. The department reserves the right to make an award on either basis. If the award is made on the 40 cents maximum basis, and the poundage increases over 225 pounds, the bid will be applied against the appropriate higher poundage rates, as shown on page 2, and full variables will be added thereto. The same procedure will be followed in the event the award is made under the $1.25 provision of the law and the poundage increases beyond 423 pounds.

The formula therefor is indicated below:

[Then followed a formula similar in many respects to that set out in Finding 109.]

During the life of the contract, so long as the 40-cent maximum provision prevails, the operator must furnish planes for transporting the mail that have a capacity of at least 10 passengers; in the event the poundage exceeds 225 pounds and payment is made on the provisions with reference to the $1.25 maximum, planes must have a capacity of at least 7 passengers. The Postmaster General reserves the right to change this requirement either by increasing or decreasing the passenger requirements at any time.

In the event a bid is submitted jointly by two companies, the experience of either company, or both, will be acceptable insofar as the requirements of the advertisement are concerned

Planes operating over this route will be required to be equipped with 2-way radio.

The Postmaster General may require the adoption by the contractor of any devices or means which, in his opinion, will further promote the safety, reliability, and dependability of air transportation.

In accordance with paragraph 7, section 1330, Postal Laws and Regulations, as amended, it is herein specified that in order for a bidder to qualify, he shall submit

evidence indicating he has had at least six months' actual experience in operating aircraft on regular night schedules over a route 250 miles or more in length.

The department reserves the right to reject any or all bids.

The attention of prospective bidders is particularly called to that provision of section 4 that the Postmaster General may award to the lowest responsible bidder who has owned and operated an air transportation service on a fixed daily schedule over a distance of not less than 250 miles and for a period of not less than six months prior to the advertisement for bids.

* * * * *

The original drafts of the advertisements for bids on these routes, which were prepared by the Post Office Department, followed the old form which had been used in prior years. However, prior to the issuance of the advertisements, William P. MacCracken, an attorney and representative of Transcontinental Air Transport, submitted to Mr. Glover certain provisions which he suggested for inclusion in the advertisement for service on the central transcontinental route. Among the provisions suggested by him were the following:

> That a regulation be drawn up to the extent that night flying experience will be required in the advertisements for bids on routes over a prescribed mileage.
>
> That the advertisement carry a provision to the effect that in the event a bid is submitted jointly by two companies, the experience of either company, or both, will be acceptable insofar as the requirements of the advertisement are concerned.

The substance of these provisions was included by Mr. Glover and Mr. Wadsworth in the advertisements for service on both the central and southern transcontinental routes.

The Postmaster General was kept advised of the general progress of the negotiations referred to in the preceding finding with respect to the parties who, he hoped, would be the successful bidders for the two routes. On the day preceding the issuance of the advertisements, a representative of Aviation Corporation sent a telegram to Mr. Wadsworth, Superintendent of Air Mails, stating, "We are satisfied to have advertisement published tomorrow."

98. When the time expired on August 25, 1930, for the

receipt of bids, it was found that only one bid had been submitted on the southern transcontinental route, namely, the joint bid of the Robertson Aircraft Corporation, subsidiary of Aviation Corporation, and Southwest Air Fast Express, Inc., which bid 100 percent of the maximum rates per mile set out in the advertisement. September 17, 1930, the Postmaster General announced that the contract on the southern transcontinental had been awarded to the joint bidders just referred to and that the contractors were to receive 40 cents a mile for the transportation of mail over that route up to 225 pounds with an appropriate change in rate in the event that poundage figure was exceeded. At that time air mail had not been carried over this entire route as a continuous operation but from the information available on air-mail operations generally, and considering the relatively small centers of population through which the route passed, it was not then reasonably to be expected that the operator on this route would be required to carry more mail in the early part of his operation than the maximum of 25 cubic feet of space set out under the 40-cent provision. That expectation was confirmed by subsequent operation of the route. However, after the Aviation Corporation was advised that it had been awarded the contract and that it was proposed to issue the contract under the 40-cent provision, the president of Aviation Corporation urged upon the Postmaster General that it could not operate the route other than at a loss under the 40-cent provision and asked that the contract be awarded to begin in the higher bracket. After considering the data submitted by the Aviation Corporation, the Postmaster General on October 1, 1930, made the award calling for 47 cubic feet of space at 75 cents per mile plus full variables, such award being made under the $1.25 maximum provision of the statute. A contract was issued to the parties on that basis as outlined in Findings 93, 94, 95, and 96. The contract remained in effect until it was duly converted into a route certificate, which continued in effect until February 19, 1934.

99. When the bids were opened on the same day, August 25, 1930, for the central transcontinental route, it was found that only two bids had been submitted, namely, the joint bid of Western Air Express, Inc., and Transcontinental Air

Transport which was for $97\frac{1}{2}$ percent of the maximum rates per mile set out in the advertisement, and that of the United Avigation Company which was for 64 percent of the maximum rates. The United Avigation Company was organized August 18, 1930, for the purpose of submitting a bid on the central transcontinental, and consisted of the United States Airways, Inc., Pittsburgh Airways, Inc., and Ohio Air Transport. Provision was made in connection with the organization of the corporation that in the event that it should be unsuccessful in securing the contract on the central transcontinental route it would be dissolved. The most active party in the formation of the Avigation Corporation was United States Airways, Inc., which was carrying on a passenger operation between Kansas City and Denver, and which had been seeking an air-mail contract over that route.

On August 21, 1930, W. G. Skelly, a heavy stockholder in United States Airways, wrote Letson, president of that company, urging him not to file his bid, stating as reasons therefor that he had been in touch with the big air lines and the Postmaster General and that as a result of such conversations he was convinced that if Letson would stand aside until after the transcontinental lines had been awarded, when the contributory lines came up for disposition, he, Letson, would be in a splendid position to receive favorable consideration. The letter was not received by Letson until after he filed his bid though he testified that had he received it in time he probably would not have filed his bid.

Prior to the submission of the bid by the Transcontinental Air Transport, Sheaffer, an officer of that company, made a report to its executive committee in which the following statement appeared:

> The Postmaster General having indicated that he could and would arrange so that an air-mail contract award would be properly made to the central transcontinental providing the two companies organized for the operation of the service, T. A. T. got together with the Western Air Express on a plan to form an operating company, on the following basis, namely:
>
> * * * * *

Shortly after the bids were opened and before the award was made, the representatives of the higher bidder submitted

a brief to the Post Office Department in which various reasons were assigned why the lower bid should be rejected and the higher bid accepted. During the consideration of the two bids and when it appeared that the award might be made to the higher bidder, charges were being made in some quarters that favoritism was being shown towards the higher bidder. One of the statements made in the public press was that an award was going to be made to the higher bidder because President Hoover's son was employed by one of the joint bidders. At that time the Postmaster General was not in Washington and the President suggested to the Acting Postmaster General that he secure an opinion from the Department of Justice on the validity of the advertisement with the view of determining whether some defect might exist therein which would permit the rejection of all bids and the readvertising of that route. In accordance with that suggestion an opinion was obtained from the Assistant to the Attorney General which was to the effect that the Postmaster General was without authority in providing in the advertisements that bidders should have at least six months' experience in night flying in order to qualify to bid on one of these air-mail routes and that accordingly the Postmaster General should reject all the bids received on the central transcontinental route and readvertise for bids for that route. While the bids were pending Glover, Second Assistant Postmaster General, instructed his assistant, Gove, to line up all the failings in the bids (especially that of Avigation) and not to accept any "strengthening documents" to the bids. However, MacCracken, a representative of T. W. A., was permitted to file a brief attacking the Avigation bid.

100. After the return of the Postmaster General, his attention was called to the controversy which had arisen over the award of the contract on the central transcontinental route and the President's suggestions in connection therewith. The Postmaster General assured the President that the advertisements were regular in every way and that there was no just cause for criticism of any action which had been taken. The President told the Postmaster General to look into the matter personally and he would leave it to him to take whatever action he thought proper. The Postmaster

General caused an examination to be made of the bids and as a result of such examination reached the conclusion that the bid of the United Avigation Company should be rejected for the reason, among others, that it did not show that the bidder had had the night flying experience called for by the advertisement nor had it had the other experience which was reasonably necessary for it to be accepted as a qualified bidder. On the other hand, the Postmaster General found that the joint bid of the Western Air Express, Inc., and Transcontinental Air Transport was regular in all particulars and a contract was awarded on the basis of that bid. The contract was awarded under the 40-cent provision of the statute. The volume of mail reasonably to be expected over that route was in excess of that to be expected on the southern transcontinental route and such expectations were confirmed by experience in subsequent operations.

By September 11, 1930, Letson was convinced that he would not get the contract even if the night-flying requirement was held to be illegal, but he did not withdraw his bid for the reason that he desired to get Avigation dissolved and to return to Kansas City without further jeopardizing his chances of securing an air-mail contract for his Kansas City-Denver line.

Immediately after the award of the contract, the United Avigation Company was dissolved. Coburn assisted Letson in securing the consent of the latter's associates to the dissolution of the company. After the award of the contract to the joint bidders, the contract was assigned by them to the Transcontinental and Western Air, Inc., which had been formed in the manner and under the conditions hereinbefore shown. Prior to the making of the award but after the opening of the bids, Col. Paul Henderson, in a conference with the president of the United States Airways, the principal promoter of Avigation Corporation, the low bidder, and a representative of Aviation Corporation, urged upon the president of the United States Airways that the Avigation Corporation could not profitably operate the central transcontinental at the price which it had bid for the contract.

After the award had been made Sheaffer, an officer of Transcontinental and Western Air, Inc., wrote Henderson on October 9, 1930, expressing his appreciation for the serv-

ices which the latter had rendered in connection with the T. W. A. award and Henderson replied expressing his gratification that he had been able to be of assistance in the matter.

During the controversy with respect to the award of this contract, its validity was questioned by the Comptroller General and at the request of the Comptroller General the Postmaster General explained in detail his reasons for making the award to the higher bidder. During the time of this controversy Col. Paul Henderson, at the request of the Postmaster General conferred with the Comptroller General in support of the award as made. The Comptroller General finally withdrew his objections after further explanations by the Postmaster General. The contract remained in full force and effect until it was duly converted into a route certificate which continued in effect until February 19, 1934.

101. The following tabulation shows the pounds of mail carried, the miles flown with mail, and the mail pay earned by the operators on the three transcontinental routes, namely, United (Routes 17 and 18), Transcontinental & Western Air (Route 34), and American Airways, Inc. (Route 33), for the years ended June 30, 1930, to June 30, 1934, inclusive:

Year ended June 30	Chicago-New York, Route 17	Chicago-San Francisco, Route 18	Atlanta-Los Angeles, Route 33	New York-Los Angeles, Route 34
POUNDS OF MAIL CARRIED				
1930	1, 690, 125	1, 919, 485	----------	----------
1931	1, 721, 229	1, 963, 303	150, 704	215, 303
1932	1, 539, 552	1, 488, 886	290, 410	1, 088, 060
1933	971, 557	964, 677	368, 595	1, 036, 768
1934	744, 461	792, 661	220, 501	721, 557
MILES FLOWN WITH MAIL				
1930	1, 225, 095	2, 678, 382	----------	----------
1931	1, 456, 075	3, 277, 080	1, 149, 947	1, 589, 653
1932	2, 088, 158	4, 415, 581	2, 355, 821	4, 005, 934
1933	2, 280, 118	4, 530, 643	3, 397, 413	5, 054, 394
1934	1, 786, 956	3, 256, 665	1, 793, 266	4, 133, 674
MAIL PAY EARNED				
1930	$1, 379, 956. 42	$3, 901, 615. 47	----------	----------
1931	1, 419, 575. 37	3, 808, 669. 62	$1, 016, 965. 58	$829, 349. 29
1932	1, 388, 939. 79	3, 366, 324. 94	1, 905, 928. 41	2, 608, 390. 03
1933	1, 148, 798. 89	2, 816, 206. 28	1, 813, 529. 11	3, 119, 613. 39
1934	478, 826. 07	1, 174, 043. 77	699, 632. 71	1, 512, 660. 49

102. In March 1929, air-mail routes were in operation with the following approximate mileage:

Route number and termini:	Length of route (miles)
1. Boston–New York	192
2. Chicago–St. Louis	278
3. Chicago–Dallas	1,059
4. Salt Lake City–Los Angeles	600
5. Salt Lake City–Pasco	530
8. Seattle–Los Angeles	1,141
9. Chicago–Minneapolis	503
11. Cleveland-Pittsburgh	123
12. Cheyenne–Pueblo	199
16. Cleveland–Louisville	345
17. New York–Chicago	718
18. Chicago–San Francisco	1,931
19. New York–Atlanta	763
20. Albany–Cleveland	446
21. Dallas–Galveston	318
22. Dallas–Brownsville	529
23. Atlanta–New Orleans	483
24. Chicago–Cincinnati	270
25. Atlanta–Miami	736
26. Great Falls–Salt Lake City	489
27. Bay City–Chicago	522
29. New Orleans–Houston	319
30. Chicago–Atlanta	785
Total	13,279

In addition, a contract had been entered into June 1, 1928 (A. M. 28), for service between St. Louis and Omaha, a distance of 403 miles, but the service thereon did not begin until May 1, 1929.

103. The tabulation set out in Table 1 herewith shows extensions made prior to March 4, 1933, with the original route mileage, dates of the original contracts, effective dates established, and points between which service was being provided.

104. As shown in Finding 103, no extensions were granted prior to the enactment of the Kelly Amendment on May 17, 1928, and from the date of the enactment of that act until March 4, 1929, five extensions were granted for a total of 392 miles. Three extensions for a total of 293 miles were granted between March 4, 1929, and the date of the enactment of the McNary-Watres Act, April 29, 1930; and one

TABLE 1

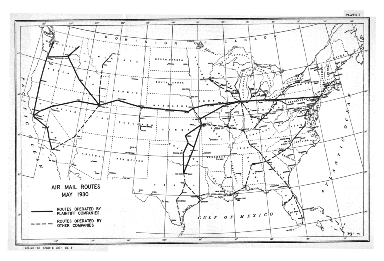
AIR-MAIL ROUTES ESTABLISHED AND EXTENSIONS MADE THERETO PRIOR TO MARCH 4, 1933

Original routes					Extensions		
Route No.	Route mileage	Date of contract	Effective date established	Service between—	Date of extension	Mileage of extension	Service between—
1	192	Nov. 7, 1925	July 1, 1926	Boston and New York	Aug. 1, 1931 [1]	204	Boston and Bangor, Me.
2	278	Nov. 7, 1925	Apr. 15, 1926	Chicago and St. Louis	July 20, 1931	269	St. Louis and Memphis.
3	987	Nov. 7, 1925	May 12, 1926	Chicago and Dallas via Tulsa	July 5, 1928	73	Tulsa and Ponca City, Okla.
4	600	Nov. 7, 1925	Apr. 17, 1926	Salt Lake City and Los Angeles	June 1, 1930	120	Los Angeles and San Diego.
5	435	Nov. 7, 1925	Apr. 6, 1926	Elko, Nev., and Pasco, Wash., via Boise, Idaho.			
6	91	Jan. 7, 1926	Feb. 15, 1926	Detroit and Cleveland.			
7	237	Jan. 7, 1926	Feb. 15, 1926	Detroit and Chicago.			
8	1,099	Jan. 27, 1926	Sept. 15, 1926	Seattle and Los Angeles	Oct. 15, 1928	32	Oakland and San Jose, Calif.
					July 1, 1930	120	Los Angeles and San Diego.
9	377	Feb. 10, 1926	June 7, 1926	Chicago, Minneapolis, and St. Paul via Milwaukee.	Dec. 15, 1928	125	Milwaukee and Green Bay, Wis.
					Mar. 8, 1930	134	Chicago and Madison.
					Feb. 2, 1931	382	St. Paul and Pembina, N. D., via Fargo.
					May 30, 1931	156	St. Paul and Duluth.
					June 2, 1931	190	Fargo and Mandan, N. D., via Bismarck, N. D.
					Mar. 2, 1933	394	Bismarck and Billings, Mont.
					Mar. 2, 1933	253	Milwaukee and Detroit.
10	393	Mar. 12, 1926	Apr. 1, 1926	Atlanta and Miami.			
11	123	Apr. 27, 1926	Apr. 21, 1927	Cleveland and Pittsburgh	June 8, 1931	186	Pittsburgh and Washington, D. C.
12	199	Oct. 27, 1927	May 31, 1928	Cheyenne and Pueblo, Colo	Aug. 1, 1931	291	Pueblo and Amarillo, Tex.
					Aug. 1, 1931	276	Pueblo and Albuquerque, N. Mex.
13	123	July 3, 1926	July 6, 1926	Philadelphia and Washington, D. C.			
14	142	Sept. 9, 1926	....	Detroit and Grand Rapids, Mich.			
15	278	Oct. 8, 1926	Oct. 10, 1926	Philadelphia and Norfolk, Va., via Washington, D. C.			
16 [2]	345	Oct. 29, 1927	Aug. 1, 1928	Cleveland and Louisville	Mar. 2, 1931	166	Louisville and Nashville.
17	723	Apr. 2, 1927	Sept. 1, 1927	New York and Chicago.			
18	1,904	Feb. 1, 1927	July 1, 1927	Chicago and San Francisco via Omaha	Jan. 16, 1932	259	Omaha and Watertown, S. D.
19	763	Mar. 18, 1927	May 1, 1928	New York and Atlanta via Richmond	Apr. 1, 1931	581	Richmond and Jacksonville.
					July 10, 1931	93	New York and Atlantic City.
					July 15, 1931 [1]	51	Philadelphia and Atlantic City.
					July 20, 1931 [1]	147	Washington and Atlantic City.
					Dec. 1, 1932	172	Charlotte, N. C., and Augusta, Ga.
20 [2]	446	Aug. 22, 1927	Dec. 17, 1927	Albany and Cleveland [3]	June 15, 1931	671	Nashville, Dallas, and Ft. Worth.
					Aug. 1, 1931	142	Albany and New York.
					Feb. 12, 1933	162	Albany and Boston.
21	283	Oct. 8, 1927	Feb. 6, 1928	Dallas and Galveston via Houston.			
22	437	Oct. 8, 1927	Feb. 6, 1928	Dallas, San Antonio, and Laredo.			
23	483	Sept. 20, 1927	May 1, 1928	Atlanta and New Orleans.			
24	270	Dec. 13, 1927	Dec. 17, 1927	Chicago and Cincinnati.			
25	672	Dec. 21, 1927	Dec. 1, 1928	Atlanta and Miami	Mar. 1, 1929	129	Daytona Beach and Tampa.
					Dec. 14, 1929	18	Tampa and St. Petersburg.
26	493	Feb. 20, 1928	June 30, 1928	Salt Lake City and Great Falls, Mont.			
27	534	May 18, 1928	July 17, 1928	Bay City, Mich., and Chicago	Nov. 27, 1928	33	Flint and Pontiac.
					Apr. 1, 1929	141	Detroit and Cleveland.
					June 16, 1930	151	Pontiac and Muskegon, Mich.
					Dec. 6, 1930	86	South Bend and Fort Wayne, Ind.
					Feb. 10, 1933	167	Detroit and Columbus.
					Feb. 11, 1933	213	Detroit and Buffalo.
28	403	June 1, 1928	May 1, 1929	St. Louis and Omaha via Kansas City.			
29	319	July 31, 1928	Jan. 23, 1929	New Orleans and San Antonio via Houston.			
30	785	Sept. 17, 1928	Nov. 19, 1928	Chicago and Atlanta	June 5, 1931	544	Kansas City and Denver.
31	9	June 15, 1929	June 15, 1929	Chicago Municipal Airport and Stevens Hotel, Chicago.			
32	449	Sept. 23, 1929	Sept. 15, 1929	Pasco (Wash.) and Spokane, and Pasco and Seattle via Portland.			
33	2,375	Oct. 1, 1930	Oct. 15, 1930	Atlanta and Los Angeles	June 15, 1931	198	Memphis and Jackson, Miss.
					June 15, 1931	164	Jackson and New Orleans.
					Aug. 1, 1931	315	Fort Worth and Amarillo.
					Aug. 1, 1931	219	El Paso and Albuquerque.
					June 15, 1932	305	Phoenix and San Diego.
34	3,333	Oct. 1, 1930	Oct. 25, 1930	New York and Los Angeles via Columbus	Feb. 1, 1933	285	Columbus and Chicago.
					Feb. 1, 1933	353	Los Angeles and San Francisco.
	20,580					8,970	

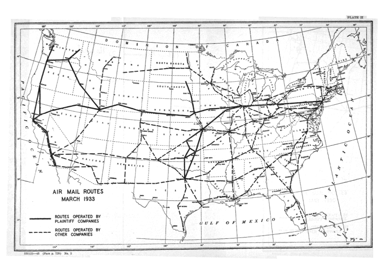
[1] Granted only for summer of 1931.
[2] Routes 16 and 20 combined May 15, 1931.
[3] A part of this route, 174 miles, was established effective Dec. 17, 1927, and the balance between that date and Mar. 4, 1929.






AIR MAIL ROUTES
MAY 1930
ROUTES OPERATED BY PLAINTIFF COMPANIES
ROUTES OPERATED BY OTHER COMPANIES
DOMINION OF CANADA
PACIFIC OCEAN
ATLANTIC OCEAN
GULF OF MEXICO
NORTH DAKOTA
SOUTH DAKOTA
NEBRASKA
KANSAS
COLORADO
WYOMING
ARIZONA
NEW MEXICO
TEXAS
IOWA
ARKANSAS
TENNESSEE
NORTH CAROLINA
PENNSYLVANIA




AIR MAIL ROUTES
MARCH 1933
ROUTES OPERATED BY PLAINTIFF COMPANIES
ROUTES OPERATED BY OTHER COMPANIES
DOMINION OF CANADA
PACIFIC OCEAN
ATLANTIC OCEAN
GULF OF MEXICO
NORTH DAKOTA
SOUTH DAKOTA
WYOMING
NEBRASKA
IOWA
COLORADO
KANSAS
UTAH
NEVADA
OREGON
WASHINGTON
ARIZONA
NEW MEXICO
NORTH CAROLINA
PENNSYLVANIA
MAINE

contract, A. M. 32, for a route mileage of 449 miles, was let by competitive bidding in that period. Three extensions for a total of 391 miles were granted between April 29, 1930, and July 24, 1930, the date of the Comptroller General's decision referred to in Finding 92. Thirty-one extensions, for a total of 7,894 miles, were granted between July 24, 1930, and March 4, 1933. Seven of the aforementioned thirty-one extensions were granted between January 1, 1933, and March 4, 1933, for a total of 1,827 miles. Air-mail routes in operation on March 4, 1929, had a total mileage of approximately 13,279 miles as compared with a total of approximately 28,000 miles on March 4, 1933. Except for the central and southern transcontinental routes where advertisements for bids were had and contracts were awarded under circumstances heretofore outlined, involving a total of 5,708 miles, all increases in the air-mail route mileage between April 29, 1930, and March 4, 1933, were accomplished through extensions without competitive bidding. The maps reproduced herewith and referred to as plates I and II show in general the approximate location of air-mail routes in operation in May 1930 and March 1933, respectively.

105. The following tabulation shows extensions made from March 4, 1933, to May 15, 1938, with the route mileage of the original contracts and effective dates established, as well as the dates of extensions, mileage of extensions, and the points between which the extensions were granted:

Original routes			Extensions		
Route No.[1]	Route mileage	Effective date established	Date of extension	Mileage of extension	Service between—
3	1,274	May 26, 1934	May 15, 1938	127	Yakima, Wash., and Portland.
4	1,329	May 13, 1934	Sept. 18, 1936	30	Fort Worth and Dallas.
14	457	May 17, 1934	Apr. 1, 1938	144	Washington and Norfolk.
16	776	June 1, 1934	Mar. 25, 1938	208	Pembina, N. D., and Winnipeg.
23	{671 788	June 10, 1934 July 1, 1934	}Jan. 2, 1937	142	New York and Albany.
26	847	July 3, 1934	Sept. 1, 1936	215	Kansas City and Tulsa.
27	401	June 25, 1934	July 1, 1935	33	Bangor and Bar Harbor.
			Aug. 4, 1937	168	Bangor and Caribou.
			Aug. 10, 1937	74	Burlington and Montreal.
28	418	June 20, 1934	Aug. 1, 1937	178	Billings and Great Falls.
29	542	July 15, 1934	June 30, 1937	108	Pueblo and Denver.
31	149	Oct. 15, 1934	Nov. 19, 1934	92	Daytona Beach and Jacksonville (discontinued July 15, 1937).
			July 16, 1937	205	St. Petersburg and Miami.
	7,652			1,724	

[1] Route numbers given to the contracts awarded after the cancellation order of Feb. 9, 1934.

106. The only extensions made to the contracts of plaintiffs, involved in these proceedings, between March 4, 1929, and February 19, 1934, were an extension of route No. 8 from Los Angeles to San Diego and an extension of route No. 18 from Omaha to Watertown, S. D., such extensions being referred to in Findings 11 and 20.

The route mileage of route No. 8, which was in operation between Seattle and Los Angeles at the time of the extension, was 1,141 miles and the extension which was granted to the Pacific Air Transport at its request was for 120 miles from Los Angeles to San Diego. The route mileage of route No. 18, which was in operation between Chicago and San Francisco at the time of the extension, was 1,931 miles and the extension was for 259 miles from Omaha, an intermediate point on the route to Watertown, South Dakota. This extension was not solicited or desired by Boeing Air Transport, Inc., to whom the extension was granted, but the operation was undertaken by that company at the request of the Postmaster General. At that time South Dakota was without air-mail service and influential residents of that state were urging that such service be provided. Three or four small passenger operators in that area desired to operate the route but the Postmaster General did not look with favor on them because of their promotional character or lack of experience or doubtful financial responsibility. The Postmaster General urged the Boeing Air Transport to undertake the operation through an extension from route A. M. 18, but Boeing Air Transport was reluctant to do so because, in its opinion, such a route would not prove profitable. The Postmaster General suggested that the extension be granted to Boeing Air Transport and then sublet by the latter to one of the small operators who desired to operate the route, and Boeing Air Transport agreed to proceed in that way provided the Postmaster General would designate the operator to whom the extension was to be sublet. June 30, 1931, the Postmaster General issued an order for the extension effective August 1, 1931. The Postmaster General, however, did not designate the party to whom the extension was to be sublet and some months elapsed during which

Boeing Air Transport unsuccessfully urged that the Postmaster General designate an operator for the extension. Under a revised order of the Post Office Department, Boeing Air Transport finally began the operation on January 16, 1932, and continued its operation until February 19, 1934, the date when all air-mail contracts and route certificates were canceled as hereinafter shown. Plaintiffs' suits for damages do not include a claim for damage on account of a cancellation of the Omaha-Watertown extension except for the period from February 20 to March 4, 1934. See Finding 133 (b).

107. In most instances the extensions set out in Finding 103 were not sublet to other operators after being granted to the contractors who were operating the respective routes, but were granted to and thereafter operated by the operators who held the contracts for the routes which were being extended.

An instance where the subletting procedure was followed was in the case of the extension from Kansas City to Denver, which was granted to the United States Airways, Inc., and became effective June 5, 1931. The president of that company, W. A. Letson, had been endeavoring since about 1929 to secure an air-mail operation for his company and actively urged his claim for consideration until a contract was secured through the foregoing extension. At the conference which began May 19, 1930, referred to in Finding 78, a claim was made by Mr. Letson and his representative, on behalf of United States Airways, Inc., for the Kansas City-Denver route and the conferees recommended that that company be considered by the Postmaster General for that operation. As shown in Finding 99, the most active party in connection with the Avigation Corporation which submitted the lower bid on the central transcontinental route was this same United States Airways, Inc. During the time the bids on that route were under consideration conferences were had between Mr. Letson and his associates and representatives of the Post Office Department and of other prominent operators with respect to the merits of the Avigation bid and the claim of United States Airways,

Inc., for consideration for an air-mail operation. While the Avigation bid was rejected on the asserted ground that it did not comply with the terms of the advertisement, and it is not proved that any definite assurance was then given that the United States Airways, Inc., would be given the extension which was ultimately granted through the subletting process, the record does show that at least the possibility of the United States Airways, Inc., securing the operation which it desired between Kansas City and Denver was discussed at that time by interested parties, including a representative of Aviation Corporation whose line was extended and the Postmaster General, and that the Postmaster General told Mr. Letson that he would help him in any possible way in securing the operation desired. Further similar responses were given by the Postmaster General to the requests of Mr. Letson over the period from October 1930, until about April 1931, when the Postmaster General determined to establish the route from Kansas City to Denver through the extension and subletting method. About the latter date, the Postmaster General asked the Aviation Corporation whether, through an appropriate subsidiary which had an air-mail contract in that area, it would accept an extension of its route and then sublet the extension to the United States Airways, Inc. The Aviation Corporation, through its subsidiary, American Airways, Inc., replied to that request on April 24, 1931, as follows:

> It is understood that it is the desire of the Post Office Department to contract with United States Airways, Inc., for the carriage of mail by air between Kansas City and Denver, and to arrange such contract by subletting to such company an extension of an existing mail contract. American Airways, Inc., is willing to cooperate with the Post Office Department by subletting an extension from its consolidated contracts Nos. 2, 28, and 30, from Kansas City to Denver, provided such extension shall have first been issued to American Airways, Inc.; and provided further that United States Airways, Inc., shall give security for the performance of such contract satisfactory to Counsel of American Airways, Inc.; and in addition thereto, a satisfactory arrangement to safeguard American Airways, Inc.,

from any loss by reason of any surety bond that it might be compelled to deposit at any time during the life of the contract by way of premium on such bond or otherwise.

The extension from Kansas City to Denver was thereafter made, as shown in Finding 103, as an extension of Route A. M. 30, which operated between Chicago and Atlanta. At the same time Aviation Corporation held a contract for carrying air mail between Chicago and St. Louis, A. M. 2, and another contract for carrying air mail between St. Louis and Omaha via Kansas City, A. M. 28. Routes A. M. 28 and A. M. 30 were consolidated May 15, 1931, and effective June 5, 1931, the Post Office Department granted an extension to American Airways, Inc., from Kansas City to Denver. On the latter date, the American Airways, Inc., sublet the extension to United States Airways, Inc., which carried on the operation thereafter until the cancellation of the contract on February 19, 1934. American Airways, Inc., as appears in Finding 95, was a subsidiary of Aviation Corporation and also operated the southern transcontinental route.

Another extension which followed a similar subletting method was from El Paso, Texas, to Albuquerque, New Mexico, such extension being made to Route A. M. 33 which was operated by American Airways, Inc., referred to in the preceding paragraph, between Atlanta and Los Angeles. The extension was granted American Airways, Inc., effective August 1, 1931, and immediately sublet to a subsidiary of Western Air Express. The American Airways, Inc., objected to the extension going to Western Air Express, which desired it to provide a through line for the latter company from Cheyenne to El Paso, but the Postmaster General decided that Western Air Express should have the extension and his decision was carried out by his granting the extension to American Airways, Inc., and that company subletting the extension to a subsidiary of Western Air Express.

Also on August 1, 1931, American Airways, Inc., was granted an extension of A. M. 33 from Fort Worth to Amarillo, Texas, and on the same day Western Air Express was

granted two extensions of its Route A. M. 12, between Cheyenne and Pueblo, Colorado, namely, one extension from Pueblo to Albuquerque and the other from Pueblo to Amarillo. The former extension together with the extension referred to above as having been made from El Paso to Albuquerque completed the through line desired by Western Air Express from Cheyenne to El Paso.

A third extension of a similar character was an extension granted to Northwest Airways, Inc., of Route A. M. 9, which operated between Chicago and Minneapolis. The extension was granted to Northwest Airways, Inc., effective March 2, 1933, for an operation between Milwaukee and Detroit, and on the same day, at the request of the Postmaster General, sublet to the Kohler Aviation Corporation.

As shown in Findings 103 and 105, the only extensions granted to the plaintiff companies during the period 1928 to 1934, inclusive, were the extension from Los Angeles to San Diego and the extension from Omaha to Watertown, the former being an extension of A. M. 8 from Seattle to Los Angeles and the latter an extension of A. M. 18 from Chicago to San Francisco. These extensions were granted to the parties who were operating the routes which were extended and were not thereafter sublet to other operators.

The extensions made by Postmaster General Brown during his administration were set out in his annual reports and were otherwise brought to the attention of Congress through requests for appropriations for extensions which had been made and for proposed extensions.

108. Through extensions or through the competitive bidding method followed with respect to Routes 33 and 34, as heretofore shown, air-mail service was provided between May 19, 1930, and February 19, 1934, on the various routes referred to in the conference report of June 4, 1930 (Finding 90) to the extent set out below. Route numbers used are the numbers used in the conference report rather than the contract numbers unless otherwise indicated.

(1) Routes for which one specific operator was recommended:

(a) *Route No. 3, Omaha to St. Paul and Winnipeg.*—At the time of the conference, Northwest Airways, Inc., was carrying on a passenger operation over that route and in the report it was recommended that that company be considered for air-mail service over the route.

At the same time Northwest Airways, Inc., had an air-mail contract for service between Chicago, Minneapolis, and St. Paul, Route A. M. 9. February 2, 1931, an extension was granted to the Northwest Airways, Inc., for Route A. M. 9 for service between St. Paul and Pembina, N. D. No other extension was granted which formed a part of "Route No. 3" until March 25, 1938, when an extension was granted from Pembina to Winnipeg.

(b) *Route No. 4, Albany to Boston.*—The conference report recommended that the Aviation Corporation be considered for service on that route. That extension was granted to a subsidiary of Aviation Corporation February 12, 1933, through an extension of its route A. M. 20.

In connection with that operation Route A. M. 16 which was owned by another subsidiary of Aviation Corporation and operated between Cleveland and Louisville was extended to Nashville March 2, 1931. Effective May 14, 1931, all existing authorizations on Routes A. M. 20 and A. M. 16 were discontinued and on the following day, May 15, 1931, Routes A. M. 20 and A. M. 16 were consolidated, being thereafter known as Route A. M. 20. June 15, 1931, Route A. M. 20 was extended from Nashville via Memphis to Dallas and Fort Worth.

(c) *Route No. 7, Denver to Kansas City.*—At the time of the conference United States Airways, Inc., was carrying on a passenger operation from Denver to Kansas City and in the report it was recommended that that corporation be considered for the operation of the air-mail route.

As shown in Finding 107, the United States Airways, Inc., received a contract for the operation of that route through the granting of an extension to a subsidiary of the Aviation Corporation on June 5, 1931, and the simultaneous subletting of the extension to United States Airways, Inc.

(d) *Route No. 8, Pueblo to Fort Worth and Dallas; Route No. 9, Pueblo to El Paso via Albuquerque.*—In the report it was recommended that Western Air Ex-

press, Inc., which was then flying both of these routes be considered for the air-mail contracts thereon. As shown in Finding 107, Western Air Express, or its subsidiary, obtained through an extension and subletting and another extension a contract for the operation of the route from Pueblo to El Paso which coincided with the recommendation on "Route No. 9." With respect to "Route No. 8," as likewise shown in Finding 107, Western Air Express obtained an extension from Pueblo to Amarillo and the rest of the route, Amarillo to Fort Worth and Dallas, was established through an extension granted to the Aviation Corporation and operated by the latter company.

(e) *Route No. 11, Great Falls to Lethbridge, Canada.*—In the report it was recommended that the National Parks Airways be considered for service on that route, but the service was not established by extension or otherwise.

(f) *Route No. 12, Seattle to Vancouver.*—In the report it was recommended that service between these two points be established through two schedules and that the first schedule be given to United and the second schedule be given to Varney Air Lines. No service either by extension or otherwise was established between these points during the period in question.

(2) Routes which were referred to as being the subject of negotiation and on which no specific operator was recommended for the service, the report merely stating the several operators who were to be considered:

(a) *Route No. 1, Los Angeles, San Diego, El Paso, Dallas to Atlanta; Route No. 6, Dallas to Louisville.*—The parties interested in the operation of these two routes were referred to in the conference report, as follows:

Atlanta to Dallas:
Eastern Air Transport and Delta Air Service.
Louisville to Dallas:
Aviation Corporation and Curtiss Flying Service.
Los Angeles, San Diego, El Paso to Dallas:
Western Air Express and Aviation Corporation.

Route No. 1 was established in the manner set out in Findings 93, 94, 95, and 96 in which, through the

negotiations and bidding method followed, the contract ultimately became that of the Aviation Corporation or its subsidiary. As shown in subdivision (1) (b) above, the Aviation Corporation or its subsidiary obtained through extensions the route from Dallas and Fort Worth to Louisville.

(b) *Route No. 2, Los Angeles, Albuquerque, Kansas City, St. Louis, Columbus, Pittsburgh, Philadelphia, and New York; Route No. 10, Amarillo, Oklahoma City, Tulsa, and St. Louis (Tulsa Cut-off)*.—The parties set out in the conference report as being interested in the operation of these routes were:

Kansas City to New York:
  Transcontinental Air Transport and Pittsburgh Aviation Industries.
Los Angeles to Kansas City, Amarillo, Oklahoma City, Tulsa, to St. Louis:
  Western Air Express and Transcontinental Air Transport.
Amarillo, Oklahoma City, Tulsa, and St. Louis Cut-off:
  Western Air Express, Southwest Air Fast Express, Transcontinental Air Transport.

At the time of the preparation of the conference report, consideration was being given to a divided operation between Los Angeles and New York, with one party operating from Los Angeles to Kansas City and another party operating from Kansas City to New York. The Postmaster General, however, decided that a through transcontinental route should be established and a contract was awarded for the transcontinental route on the joint bid of Western Air Express and Transcontinental Air Transport, as shown in Findings 99 and 100, after contractual arrangements had been entered into between those two companies, which included as a third party in interest Pittsburgh Aviation Industries Corp., as shown in Finding 96.

(c) *Route No. 5, Pittsburgh to Washington and Norfolk*.—No statement was made in the conference report of the operator or operators to be considered for service on this route, the report merely stating "Final terms not yet arranged." The record is insufficient to show the exact manner in which this route was established other than that the contract A. M. 11 for service between Cleveland and Pittsburgh was sublet to Pennsylvania Airlines, Inc., a subsidiary of Pittsburgh Aviation In-

dustries Corp., October 24, 1930, and that route was extended from Pittsburgh to Washington, effective June 8, 1931.

109. As shown in Finding 63, one of the objections Postmaster General Brown had to the air-mail statutes which were in effect when he came into office was that in his opinion thereunder the Post Office Department could not require air-mail operators to carry passengers. At that time most of the air-mail operators not only were not carrying passengers but were reluctant to do so, whereas the Postmaster General was urging them to undertake that service not only for the purpose of developing commercial aviation, which he considered one of the purposes of the air-mail statutes, but also for the purpose of supplementing the revenues of air-mail operators and thereby enabling the Post Office Department to reduce the rate paid for transporting mail. The words "and passenger transportation" in section 6 of the McNary-Watres Act were added at the request of the Postmaster General in order to give to him the authority which he considered necessary to require air-mail operators to carry passengers.

In the issuance of route certificates after the passage of the McNary-Watres Act, the Postmaster General required that the operators receiving such certificates upon the surrender of their air-mail contracts should provide accommodations for the carrying of passengers, and that requirement was incorporated in the route certificates involved in these proceedings which were issued to Pacific Air Transport, Boeing Air Transport, Inc., Varney Air Lines, Inc., and National Air Transport, Inc. (hereinafter sometimes referred to as the "carriers"), the accommodations called for ranging from two to ten passengers. A similar provision was incorporated in the advertisements for bids for the southern and central transcontinental routes, referred to in Finding 97.

In fixing the rates to be paid under route certificates which were issued under section 6 of the McNary-Watres Act, the Post Office Department promulgated a formula governing the rates of pay to route certificate holders transporting air mail under that act. The first formula was promulgated May 1, 1930, and that was superseded by similar formulae at later dates. The formula of May 1, 1930, reads as follows:

POST OFFICE DEPARTMENT
SECOND ASSISTANT POSTMASTER GENERAL
Division of Air Mail Service

MAY 1, 1930.

Formula for determining rates of pay to route certificate holders transporting air mail under the Act of Congress, approved April 29, 1930

Weight unit (pounds)	Space unit (cu. ft.)	Base rate	Variables										Multi-motor operation when necessitated by mail and passenger loads
			Night flying	Terrain	Fog	One-way radio	Two-way radio	Passenger capacity of equipment used					
								2 to 5 passengers	6 to 9 passengers	10 to 19 passengers	20 to 29 passengers	30 and over	
		Cents per mile											
200	12.5	55	15	2	2.5	3	6	1.5	3	4.5	6	7.5	----------
400	25	65	15	2	2.5	3	6	1.5	3	4.5	6	7.5	----------
750	47	75	15	2	2.5	3	6	1.5	3	4.5	6	7.5	----------
1,000	62.5	85	15	2	2.5	3	6	1.5	3	4.5	6	7.5	13
1,250	78	90	15	2	2.5	3	6	1.5	3	4.5	6	7.5	13
1,600	80 to 100	92.5	15	2	2.5	3	6	1.5	3	4.5	6	7.5	13
2,000	125	95	15	2	2.5	3	6	1.5	3	4.5	6	7.5	13

110. During 1930 and thereafter, Col. Paul Henderson was connected with the plaintiff companies in the manner outlined in Finding 84 and as shown in the same finding had been Second Assistant Postmaster General from 1922 until July 31, 1925. When he assumed the office of Assistant Postmaster General, Chase C. Gove was chief clerk in the railway mail service and shortly thereafter Colonel Henderson promoted him to the position of chief clerk of the Second Assistant Postmaster General. In the latter capacity, Mr. Gove acted as Second Assistant Postmaster General in the absence of the Second Assistant Postmaster General. Mr. Gove continued in the capacity of chief clerk at least until May 1, 1933. In addition to their former official connection, Colonel Henderson and Mr. Gove and their families were close personal friends and lived near one another.

At a meeting at lunch October 10, 1930, Mr. Gove told Colonel Henderson that he was in financial difficulties because of stock which he had purchased on margin and that his broker was about to sell the stock because he could not supply additional margin. Colonel Henderson told Mr. Gove that he would lend him $3,000 to help him in that financial difficulty. The arrangement was carried out by having Mr. Gove give his note at the District National Bank where Colonel Henderson had an account and with the endorsement of Colonel Henderson thereon Mr. Gove secured $3,000. A similar situation arose again approximately one month later through which Mr. Gove secured an additional $2,000 on a note which was endorsed by Colonel Henderson. The stock purchased by Mr. Gove continued to decline and since Colonel Henderson did not desire to have notes outstanding that might not be paid, he instructed the officials of the District National Bank on November 24, 1930, to charge the amount of the notes to his account and cancel the notes, which instructions were carried out. December 24, 1930, Colonel Henderson loaned Mr. Gove an additional $5,000 for the same purpose. Mr. Gove gave to Colonel Henderson his unsecured note or notes for the total amount of $10,000 borrowed.

When one or more of the loans was being made, Colonel Henderson told Mr. Gove that in the event he (Mr. Gove)

realized a profit on the stock which was being protected through these loans, it would seem that he (Colonel Henderson) should share in the profits, and Mr. Gove agreed. The stock, however, continued to decline in price and was ultimately sold with the loss of Mr. Gove's entire investment therein. After that occurred, Mr. Gove offered to give Colonel Henderson a second mortgage on his home to secure the loan but that was refused by Colonel Henderson with the statement that he knew Mr. Gove would repay the loan if possible and that he did not desire to be in the position of holding a second trust on his home. Mr. Gove later told Colonel Henderson that he had had his life insured for $10,000 in favor of Colonel Henderson. The notes were never repaid and some years later Colonel Henderson destroyed them.

While the record shows instances where Colonel Henderson saw Mr. Gove from time to time at his office and outside his office about official matters in the Post Office Department in which Colonel Henderson was interested on behalf of the plaintiff companies and their predecessors and that orders or documents were signed by Mr. Gove which related to those companies, the record is insufficient to support a finding that any corrupt act or acts affecting the Post Office Department occurred as a result of the money transaction referred to above, or the personal relationship between Colonel Henderson and Mr. Gove.

111. During the last week or two preceding the close of Postmaster General Brown's administration on March 4, 1933, the Postmaster General and the Second Assistant Postmaster General caused to be burned the contents of various filing cabinets located in their immediate offices where certain papers for the current year and the preceding year were filed, and also the contents of various filing cabinets in another room where similar papers were filed for earlier years. The filing cabinets contained correspondence and papers both of a personal and official character. Prior to the destruction, the Postmaster General and the Second Assistant Postmaster General caused the files to be examined for the purpose of determining what papers, if any, should be retained by them. The burning of the files was accomplished without compliance with Section 112, Title 5, of the United States Code re-

quiring that certain procedure be followed before public files are destroyed. The record is insufficient to show whether any of the papers destroyed related to the controversies involved in these proceedings.

112. The transportation of passengers by aircraft requires large investments in flying equipment and ground facilities over and above investments required by exclusive air-mail operations without passenger service. The carriers named in Finding 109 complied with the regulations and policy of the Post Office Department requiring air-mail contractors to adjust air-mail operations to advances in the art of flying and passenger transportation. These carriers, after the issuance of their respective route certificates, provided aircraft with suitable accommodations for passengers and from time to time thereafter acquired and placed in service aircraft of improved design, speed, safety, and passenger comfort. Pacific Air Transport used single-engine airplanes to transport air mail on Route C. A. M. 8 starting September 16, 1926, but it purchased and put into operation in 1931 three Fokker and six Ford trimotor airplanes, each with accommodations for ten passengers. Progress in the aviation industry was such that the company's trimotor airplanes acquired in 1931 became obsolete in less than three years and in 1933 Pacific Air Transport acquired and put into operation dual-motor Boeing airplanes, type 247, carrying ten passengers and operating with greater speed, efficiency, and comfort than prior equipment. Boeing Air Transport, Inc., started operations on Route C. A. M. 18 on July 1, 1927, with Boeing 40B2 airplanes, carrying two passengers. In 1929 Boeing trimotor equipment was put in operation West of Salt Lake City and by 1930 the company furnished trimotor service over the entire route from Chicago to San Francisco. In 1933 this equipment was replaced by dual-motor Boeing airplanes, type 247. Airplanes not designed for carrying passengers were first used on Route C. A. M. 5 and Route C. A. M. 32 by Walter T. Varney and Varney Air Lines, Inc. At various times in 1930 and 1931, service was rendered with Boeing four-passenger single-engine airplanes, which were replaced by Ford trimotor airplanes, and in 1933 by dual-motor Boeing airplanes, type 247. Ford trimotor airplanes were acquired

by National Air Transport, Inc., in 1930 and were placed in service on Routes C. A. M. 17 and C. A. M. 3. This equipment was replaced in 1933 by dual-motor Boeing airplanes, type 247.

113. The carriers of air mail involved in these suits, in order to carry out the policy of the Post Office Department and their obligations under their respective route certificates for the development of passenger transportation by aircraft, as well as for the general advancement of their air carrying activities, made large investments in flying equipment and in ground facilities, such as shops, hangars, passenger waiting rooms, offices, airports, and improvements relating thereto, and incurred obligations under numerous leases and other executory contracts. These carriers also made large expenditures in acquiring passenger and express patronage and good-will and an efficient flying and ground personnel. A substantial portion of such investments and expenditures was made by these carriers in reliance upon their respective route certificates and upon the assumption that they would be permitted to continue the transportation of mail on their respective routes throughout the terms of their route certificates, all of which were written to terminate on April 5, 1936.

114. From the effective dates of their respective route certificates, until February 19, 1934, these carriers performed all services authorized or required under their respective air-mail route certificates and under the several modifications thereof ordered from time to time by the Post Office Department. Such services were accepted as satisfactory by one Postmaster General from the effective dates of the route certificates until March 4, 1933, and by his successor from March 4, 1933, until the cancellation of their route certificates, as hereafter set forth, on February 19, 1934, and throughout the periods of the route certificates, up to January 1934, the services rendered by these carriers in transporting mail by aircraft on their respective routes were paid for pursuant to monthly claims which were approved by the Postmaster General and the Comptroller General.

115. February 9, 1934, when the air-mail route certificates of these carriers were in full force and effect and were being satisfactorily performed, the Postmaster General executed

and issued the following order, known as Post Office Department Order No. 4959:

POST OFFICE DEPARTMENT,
Washington, February 9, 1934.

Order No. 4959

Pursuant to the authority vested in me by Section 3950, Revised Statutes of the United States, Act of June 8, 1872 (39 United States Code, Section 432), and by virtue of the general powers of the Postmaster General, it is ordered that the following air-mail contracts be, and they are hereby annulled effective midnight February 19, 1934, viz:

Route number	*Contracts held by*
A. M. 1	American Airways, Inc.
A. M. 2	American Airways, Inc.
A. M. 3	National Air Transport, Inc.
A. M. 4	Western Air Express, Inc.
A. M. 5	Boeing Air Transport, Inc.
A. M. 8	Pacific Air Transport.
A. M. 9	Northwest Airways, Inc.
A. M. 9	Kohler Aviation Corporation.
A. M. 11	Pennsylvania Airlines, Inc.
A. M. 12	Western Air Express, Inc.
A. M. 17	National Air Transport, Inc.
A. M. 18	Boeing Air Transport, Inc.
A. M. 19	Eastern Air Transport, Inc.
A. M. 20	American Airways, Inc.
A. M. 21	American Airways, Inc.
A. M. 22	American Airways, Inc.
A. M. 23	American Airways, Inc.
A. M. 24	American Airways, Inc.
A. M. 26	National Parks Airways, Inc.
A. M. 27	American Airways, Inc.
A. M. 29	American Airways, Inc.
A. M. 30	American Airways, Inc.
A. M. 30	Boeing Air Transport, Inc.
A. M. 30	United States Airways, Inc.
A. M. 33	American Airways, Inc.
A. M. 34	Transcontinental and Western Air, Inc.

(Signed) JAMES A. FARLEY,
Postmaster General.

February 10, 1934, Pacific Air Transport received from the Postmaster General the following telegram, dated February 10, 1934:

YOU ARE HEREBY NOTIFIED THAT I HAVE ENTERED FOLLOWING ORDER QUOTE PURSUANT TO THE AUTHORITY VESTED IN ME BY SECTION THIRTY NINE FIFTY REVISED STATUTES OF THE UNITED STATES ACT OF JUNE EIGHT, EIGHTEEN SEVENTY TWO (THIRTY NINE UNITED STATES CODE SECTION FOUR THIRTY TWO) AND BY VIRTUE OF THE GENERAL POWERS OF

THE POSTMASTER GENERAL IT IS ORDERED THAT THE FOLLOWING AIR MAIL CONTRACTS BE AND THEY ARE HEREBY ANNULLED EFFECTIVE MIDNIGHT FEBRUARY NINETEEN NINETEEN THIRTY FOUR QUOTE ROUTES ROUTE CERTIFICATES AND CONTRACTS HELD BY YOU INCLUDING CONTRACT AIR MAIL ROUTE EIGHT STOP YOU ARE INSTRUCTED TO RECEIVE NO MAIL FOR TRANSPORTATION HEREAFTER THAT CANNOT REACH ITS DESTINATION WITH THE EFFECTIVE DATE OF THE ORDER

JAMES A. FARLEY,
Postmaster General.

February 10, 1934, Boeing Air Transport, Inc., and National Air Transport, Inc., each received from the Postmaster General a duplicate of the above-quoted telegram, except that the telegram to Boeing Air Transport, Inc., referred to Routes 5 and 18 and the telegram to National Air Transport, Inc., referred to Routes 3 and 17.

Section 3950, Revised Statutes, referred to in the foregoing order of February 9, 1934, reads as follows:

> No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled; and for the first offense the person so offending shall be disqualified to contract for carrying the mail for five years, and for the second offense shall be forever disqualified.

116. Thereafter Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc., each received a letter from the Postmaster General dated February 13, 1934, enclosing copies of the above-quoted Department Order No. 4959, dated February 9, 1934, and a copy of the above-quoted telegram of February 10, 1934.

117. February 16, 1934, Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc., each sent to the Postmaster General a letter protesting the cancellation of its air-mail contracts and requesting suspension of the cancellation order and a hearing. February 19, 1934, each of these carriers sent a telegram to the Postmaster

General stating that it was able and willing to continue the transportation of the air mail under its route certificates, and requesting that appropriate instructions be issued to postmasters to deliver air mail to it for transportation. No reply was received to any of these telegrams.

118. February 16, 1934, United Air Lines, Inc., on behalf of these carriers, wrote to the Postmaster General and called his attention to a published letter of the Postmaster General dated February 14, 1934, and to certain alleged misinformation contained therein, upon which his cancellation order of February 9, 1934, was predicated, and again requested an opportunity to be heard with reference thereto. No reply was received to this communication. March 7, 1934, United Air Lines, Inc., on behalf of these carriers, again wrote to the Postmaster General stating that no reply had been received to the letter of February 16, 1934, and that these carriers were losing in excess of $250,000 a month, and again requesting an opportunity for a hearing. March 27, 1934, the Postmaster General replied to the carriers' requests for a hearing stating that a written brief could be presented to the Post Office Department, and that it would be carefully considered. On or about April 14, 1934, these carriers jointly filed a brief with the Post Office Department. Nothing further was heard from the Department. The order of February 9, 1934, No. 4959, was executed, issued, and carried out by the Post Office Department without giving to these carriers, or any of them, either notice that such action was contemplated or a hearing with reference thereto other than as set out above.

119. April 18, 1934, these carriers severally filed suits in equity in the Supreme Court of the District of Columbia against the Postmaster General as an individual, to enjoin the enforcement of the order of February 9, 1934, and to revoke the order. The defendant filed motions to dismiss, which were sustained by the District Court on June 6, 1934. The carriers appealed to the United States Court of Appeals for the District of Columbia, and on February 4, 1935, that Court affirmed the decrees of the lower court dismissing the bills of complaint, and said that "The effect of the order, therefore, is to breach the contract, and, if the breach of

the contract operated to deprive plaintiffs of their property rights, they have an adequate and complete remedy at law. What has occurred in these cases amounts to a breach of the contracts by the Postmaster General. Whether properly or improperly breached cannot be determined in this action, but remains to be established in the appropriate action at law [in the Court of Claims of the United States]." See *Boeing Air Transport, Inc.* v. *Farley and related cases*, 75 Fed. (2d) 765. Pacific Air Transport filed a petition in the Supreme Court of the United States for a writ of certiorari, and on April 1, 1935, its petition was denied. 294 U. S. 728.

120. Prior to February 9, 1934, when the order referred to in Finding 115 was issued, dissatisfaction had been shown in many quarters with respect to the air-mail situation and agitation had started as early as the fall of 1930 for a congressional investigation of this subject. Among those who urged such action was Col. Paul Henderson who was connected with plaintiffs as hereinbefore shown, and who was generally opposed to the large number of extensions which the Postmaster General was making. During the period between 1930 and 1933, there was an investigation of this matter by two committees of Congress and finally on February 25, 1933, a Senate resolution was adopted creating a special committee of the Senate to investigate air-mail and ocean-mail contracts. Senator Hugo Black, of Alabama, was made chairman of the committee and during the period between the date of the creation of the committee and February 9, 1934, many hearings were held by that committee at which various witnesses testified. In addition, investigations were being made at the same time by the Post Office Department in connection with the Senate investigation.

On February 6, 1934, the Solicitor of the Post Office Department submitted a preliminary report (defendant's Exhibit 642–A) to the Postmaster General in which he reviewed the results of the investigations which had been made and accompanied his report with two volumes (defendant's Exhibits 642–B and 642–C) containing "copies of contracts, other documents and correspondence, statements of officials in the Post Office Department, and a statement of the evi-

dence introduced before the Senate committee investigating air and ocean-mail contracts," and recommended that all air-mail contracts and route certificates for air-mail transportation be annulled, such recommendation concluding with the following statements:

> All air-mail contracts and route certificates for domestic air-mail transportation may be annulled:
> (*a*) by an executive order of the President of the United States, as provided in Section 5 of the Independent Offices Bill of the Seventy-third Congress;
> (*b*) as provided in the Act of Congress, as amended, of April 29, 1930; or
> (*c*) by an order of the Postmaster General under 39 U. S. Code, Section 432, which provides:
> "No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled."
> (*d*) by order of the Postmaster General, when found to have been fraudulently or illegally awarded;
> (*e*) under Section 1846 of the Postal Laws and Regulations, 1932, in the public interest.
> Since these contracts were procured as a result of fraud, conspiracy, and collusion between post-office officials and the holders of such contracts, it is my recommendation that if they be annulled, the action be taken on the grounds (*c*), (*d*), and (*e*) above mentioned.

Section 1846 of the Postal Laws and Regulations referred to above reads as follows:

> The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, the contractor to be allowed, as full indemnity, one month's extra pay, on the amount of service dispensed with and a pro rata compensation for the amount of service retained and continued.

In addition there was presented to the Postmaster General at the same time various documents, including letters, tele-

grams, and memoranda having to do with the air-mail situation, which documents appear in defendant's Exhibit 642–D. The Postmaster General considered the information, representations, and recommendations set out in defendant's Exhibits 642–A, 642–B, 642–C, and 642–D, and after consideration of the material set out in those exhibits reached the conclusion that order No. 4959 of February 9, 1934, should be issued on the ground that the carriers referred to in such order had violated section 3950 of the Revised Statutes of the United States and that the public interest required the exercise of his general powers as Postmaster General in making such an order.

February 14, 1934, the Postmaster General wrote a letter to the Hon. Hugo L. Black, Chairman, Special Committee on Investigation of Air-Mail and Ocean-Mail Contracts, in which his beliefs were correctly recorded as to his reasons for issuing the order of February 9, 1934, such letter appearing in the record as defendant's Exhibit 643. Defendant's Exhibits 642–A, 642–B, 642–C, 642–D, and 643 are incorporated herein by reference.

121. Upon the annulment of all air-mail contracts and route certificates, effective February 19, 1934, the United States Army was ordered to transport the mails over necessary routes during the emergency. The task was undertaken immediately by the Army over some routes and continued over some until May 31, 1934. During every month from February 1934, to June 1936, inclusive, large quantities of mail were moved by aircraft, ranging from 198,492 pounds in March 1934, to 1,476,469 pounds in June 1936. The prevailing air-mail postage rate during that period was six cents for each ounce or fraction thereof.

122. On January 1, 1934, the investments of Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc., in physical properties, consisting of airplanes, engines, hangars, and other flying and ground equipment, amounted to $7,569,081.20, less a depreciation reserve of $2,830,897.34. Their total assets on that date, including their physical assets at their depreciated value, were $10,067,-760.61. They had approximately the same assets on February 19, 1934, the date of the cancellation of the contracts. On that date, the number and classification of employees of Pacific

Air Transport, Boeing Air Transport, Inc., National Air Transport, Inc., and United Air Lines, Inc., were as follows:

	Pacific Air Transport	Boeing Air Transport, Inc.	National Air Transport, Inc.	United Air Lines, Inc.	Totals
General Administrative Personnel—Including Accounting Department	----------	----------	----------	81	81
Flight Personnel:					
Pilots	20	62	52	----------	134
Second Pilots	19	36	40	----------	95
Stewardesses	17	37	33	----------	87
Other Operating Personnel:					
Station Managers and Staffs	21	48	60	----------	129
Mechanics and Riggers	114	234	271	----------	619
Radio Operators	12	14	24	----------	50
Other Station Attendants, Plane Washers, Janitors, Stock Clerks	37	22	69	----------	128
Traffic and Advertising Personnel	----------	----------	----------	122	122
Totals	240	453	549	203	1,445

If the use of these carriers' properties had been discontinued, the value thereof and the value of their highly trained flying and ground personnel, and their passenger and express patronage and goodwill and going concern value would have been substantially reduced, and, in order to preserve and protect their properties and business and carry out their obligations under numerous executory contracts, they continued the operation of the schedules in effect on February 19, 1934, on Routes A. M. 8, A. M. 18, A. M. 5, A. M. 17, and A. M. 3, but carried only passengers and express and did not carry any mail on any route after February 19, 1934, because of the cancellation order of the Postmaster General, until the transportation of mail was resumed under new contracts, as hereafter set forth, on May 8, 1934.

123. March 30, 1934, the Postmaster General issued and published several advertisements, stating that sealed proposals would be received at the office of the Second Assistant Postmaster General until April 19, 1934, for the transportation of mail by aircraft for temporary periods of three months from the date of commencement of service, to be extended for two periods of not more than three months each, at the option of the Postmaster General, on certain routes, including the following:

A. M. 11: From Seattle, Washington, via Tacoma, Washington, Portland and Medford, Oregon, Sacra-

mento, Oakland, San Francisco, Fresno, Bakersfield, and Los Angeles, California, to San Diego, California, and return, that route being the same as former Route A. M. 8 operated by Pacific Air Transport (see Findings 2 and 11).

A. M. 1: From Newark, New Jersey, via Cleveland and Toledo, Ohio, Chicago, and Moline, Illinois, Iowa City and Des Moines, Iowa, Omaha, Lincoln, Grand Island and North Platte, Nebraska, Cheyenne and Rock Springs, Wyoming, Salt Lake City, Utah, Elko and Reno, Nevada, Sacramento and San Francisco, California, to Oakland, California, and return, that route being the same as former Routes A. M. 17 and A. M. 18 operated by National Air Transport, Inc., and Boeing Air Transport, Inc. (see Findings 13 and 42).

A. M. 12: From Salt Lake City, Utah, via Boise, Idaho, Pendleton, Oregon, Pasco and Spokane, Washington, Portland, Oregon, and Tacoma, Washington, to Seattle, Washington, and return, that route being the same as former Route A. M. 5 operated by Varney Air Lines, Inc., and later by Boeing Air Transport, Inc. (See Findings 22 and 25.)

A. M. 9: From Chicago, Illinois, via Kansas City, Missouri, Wichita, Kansas, Ponca City and Oklahoma City, Oklahoma, to Fort Worth and Dallas, Texas, and return, that route being the same as former Route A. M. 3 operated by National Air Transport, Inc. (see Finding 48).

124. Each of these advertisements provided that the rate of pay under such temporary contracts would be based on definite weight spaces per airplane mile, one cubic foot of space being computed as the equivalent of nine pounds of air mail. On Route A. M. 11 (Seattle to San Diego), the contractor was required to provide 30 cubic feet of space and the rate could not exceed 44 cents per airplane mile; whereas the rate in effect for this route at the time of cancellation ranged from 43 cents to 45 cents per airplane mile for 18.7 cubic feet of space. On Route A. M. 1 (Newark to Oakland), the contractor was required to provide 70 cubic feet of space and the rate could not exceed 42 cents per airplane mile; whereas the rate in effect at the time of cancellation for Route A. M. 18 (Chicago to Oakland) ranged from 40 cents to 45 cents per airplane mile for 18.7 cubic feet of space and for Route A. M. 17 (Chicago to Newark) 40 cents per airplane mile for 18.7 cubic feet of space. On Route A. M. 12 (Salt

Lake City to Seattle), the contractor was required to provide 25 cubic feet of space and the rate could not exceed 44 cents per airplane mile; whereas the rate in effect for this route at the time of cancellation ranged from 43 cents to 45 cents per airplane mile for 18.7 cubic feet of space. On Route A. M. 9 (Chicago to Dallas), the contractor was required to provide 35 cubic feet of space and the rate could not exceed 45 cents per airplane mile; whereas the rate in effect at the time of cancellation ranged from 40 cents to 43 cents per airplane mile for 18.7 cubic feet of space.

125. The advertisements of March 30, 1934, published by the Postmaster General, each contained the following provision:

> No bids shall be considered or received from any company which previously had a contract for the carriage of air mail and whose contract was annulled under Revised Statutes, section 3950, as all such concerns are disqualified by law to contract for carrying the mail for 5 years after the annulment of the contract. Section 3950, Revised Statutes, reads as follows:
>
> "No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled; and for the first offense the person so offending shall be disqualified to contract for carrying the mail 5 years, and for the second offense shall be forever disqualified." [Sec. 432, Title 39, U. S. Code.]

Because the air-mail route certificates of the carriers involved in these proceedings had been annulled by the Postmaster General under Section 3950 of the Revised Statutes, these carriers were precluded by the above-quoted provision from participating in the bidding for temporary air-mail contracts pursuant to the advertisements of March 30, 1934.

126. (a) From various dates in 1930 to April 30, 1934, plaintiffs realized net income or sustained losses as shown by the tabulation appearing herewith and designated as Table 2.

TABLE 2

SUMMARY OF OPERATING REVENUES AND EXPENSES, BY ROUTES, FOR AIR MAIL ROUTES A. M. 8, A. M. 18, A. M. 5, A. M. 17 AND A. M. 3

Company, route, and period	Mail revenue	Passenger and excess baggage revenue	Express revenue	Other operating revenue	Total operating revenue	Total operating expense	Net revenue from operations	Taxes and uncollectible revenue	Net income from operations	Nonoperating income and deductions, net	Net income
Pacific Air Transport, A. M. 8—Seattle-Los Angeles-San Diego:											
From June 1, 1930 to December 31, 1930	$431,587.65	$65,827.42	$1,778.08	$1,256.14	$500,449.29	$392,880.33	$107,568.96	$21,430.55	$86,138.41	$15,724.32	$101,862.73
From January 1, 1931 to December 31, 1931	897,877.01	268,861.49	3,073.92	76,339.12	1,246,151.54	1,158,956.65	87,194.89	11,471.86	75,723.03	[6] *22,651.62*	53,072.01
From January 1, 1932 to December 31, 1932	957,539.69	376,096.91	7,754.61	61,777.42	1,403,168.63	1,184,740.31	218,428.32	23,240.83	195,187.49	12,630.20	207,817.69
From January 1, 1933 to December 31, 1933	828,285.66	521,126.92	14,584.07	38,877.56	1,402,874.21	1,410,562.61	[6] *7,688.40*	11,137.37	[6] *18,825.77*	5,750.05	[6] *13,075.72*
From January 1, 1934 to February 28, 1934	[1] 96,897.32	92,402.63	3,949.83	7,184.02	200,433.80	300,768.18	[6] *100,334.38*	2,500.00	[6] *102,834.38*	103.15	[6] *102,731.23*
From March 1, 1934 to April 30, 1934		119,051.59	5,325.89	12,849.74	137,227.22	309,710.16	[6] *172,482.94*	[6] *523.43*	[6] *171,959.51*	492.09	[6] *171,467.42*
Boeing Air Transport, Inc., A. M. 18—Chicago-San Francisco-Watertown:											
From November 1, 1930 to December 31, 1930	554,469.47	18,116.41	1,262.69	53,491.70	627,340.27	610,927.43	16,412.84	4,465.21	11,947.63	4,420.33	16,367.96
From January 1, 1931 to December 31, 1931	3,757,132.70	407,490.72	7,693.22	138,488.49	4,310,805.13	3,089,677.13	1,221,128.00	162,956.15	1,058,171.85	30,349.85	1,088,521.70
From January 1, 1932 to December 31, 1932	3,034,356.74	782,048.72	19,905.74	74,591.03	3,910,902.23	3,013,843.25	897,058.98	140,335.78	756,723.20	7,733.77	764,456.97
From January 1, 1933 to December 31, 1933	2,198,097.99	1,412,557.95	50,029.98	70,788.97	3,731,474.89	3,279,775.72	451,699.17	97,645.41	354,053.76	3,197.69	357,251.45
From January 1, 1934 to February 28, 1934	[2] 238,555.68	186,469.73	9,102.77	18,341.55	452,469.73	527,908.32	[6] *75,438.59*	6,376.92	[6] *81,815.51*	657.88	[6] *81,157.63*
From March 1, 1934 to April 30, 1934		186,206.32	20,689.24	27,284.36	234,179.92	513,819.69	[6] *279,639.77*	2,095.85	[6] *281,735.62*	401.06	[6] *281,334.56*
Varney Air Lines, Inc.-Boeing Air Transport Inc., A. M. 5—Salt Lake-Portland-Seattle-Spokane:											
From May 1, 1930 to December 31, 1930	662,008.71	27,513.77	338.58	3,129.74	692,990.80	437,979.07	255,011.73	30,268.16	224,743.57	1,752.16	226,495.73
From January 1, 1931 to December 31, 1931	951,811.39	53,142.00	303.03	21,869.92	1,027,126.34	721,926.49	305,199.85	39,411.30	265,788.55	7,413.39	273,201.94
From January 1, 1932 to December 31, 1932	740,661.49	72,257.94	1,586.17	17,465.10	831,970.70	640,261.61	191,709.09	31,854.66	159,854.43	2,886.23	162,740.66
From January 1, 1933 to December 31, 1933	555,380.27	130,278.23	3,546.05	23,873.27	713,077.82	769,091.74	[6] *56,013.92*	9,417.90	[6] *65,431.82*	1,204.36	[6] *64,227.46*
From January 1, 1934 to February 28, 1934	[3] 69,736.62	17,494.80	631.15	334.61	88,197.18	126,964.69	[6] *38,767.51*	994.98	[6] *39,762.49*	140.53	[6] *39,621.96*
From March 1, 1934 to April 30, 1934		18,818.44	1,316.44	924.07	21,058.95	123,150.24	[6] *102,091.29*	973.47	[6] *103,064.76*	517.09	[6] *102,547.67*
National Air Transport, Inc., A. M. 17—Chicago-New York:											
From November 1, 1930 to December 31, 1930	218,658.66	19,774.15	2,766.24	667.54	241,866.59	191,499.30	50,367.29	17.62	50,349.67	7,270.88	57,620.55
From January 1, 1931 to December 31, 1931	1,491,252.98	535,869.82	16,646.28	25,001.85	2,068,770.93	1,813,515.47	255,255.46	26,106.25	229,149.21	37,905.10	267,054.31
From January 1, 1932 to December 31, 1932	1,230,741.65	908,328.99	25,176.94	28,201.62	2,192,449.20	1,855,209.09	337,240.11	54,051.59	283,188.52	38,010.37	321,198.89
From January 1, 1933 to December 31, 1933	897,672.82	1,560,464.53	56,560.02	12,778.22	2,527,475.59	2,536,660.91	[6] *9,185.32*	25,403.41	[6] *34,588.73*	36,968.94	2,380.21
From January 1, 1934 to February 28, 1934	[4] 100,794.80	174,481.33	10,506.27	7,157.70	292,940.10	377,603.63	[6] *84,663.55*	2,929.99	[6] *87,593.52*	4,863.97	[6] *82,729.55*
From March 1, 1934 to April 30, 1934		215,282.23	19,077.20	[6] *4,005.22*	230,354.21	387,457.80	[6] *157,103.59*	3,113.79	[6] *160,217.38*	2,843.51	[6] *157,373.87*
National Air Transport, Inc., A. M. 3—Chicago-Fort Worth-Dallas:											
From May 1, 1930 to December 31, 1930	820,455.91		2,812.60	1,343.80	824,612.31	570,609.27	254,003.04	28,730.09	225,272.95	33,475.45	258,748.40
From January 1, 1931 to December 31, 1931	1,199,819.15	174,739.32	3,533.67	11,292.21	1,389,384.35	1,147,019.84	242,364.51	30,062.98	212,301.53	37,905.05	250,206.58
From January 1, 1932 to December 31, 1932	1,001,247.03	288,959.44	4,231.59	14,049.38	1,308,487.44	1,189,831.14	118,656.30	19,319.69	99,336.61	38,010.36	137,346.97
From January 1, 1933 to December 31, 1933	781,838.58	323,552.46	8,338.06	7,295.38	1,121,024.48	1,187,635.61	[6] *66,611.13*	9,055.68	[6] *75,666.81*	36,968.78	[6] *38,698.03*
From January 1, 1934 to February 28, 1934	[5] 86,137.01	44,040.71	1,540.39	2,266.80	133,984.91	206,473.86	[6] *72,488.95*	1,505.19	[6] *73,994.14*	4,863.97	[6] *69,130.17*
From March 1, 1934 to April 30, 1934		48,667.80	3,924.77	355.56	52,948.13	210,773.87	[6] *157,825.74*	1,513.86	[6] *159,339.60*	2,843.50	[6] *156,496.10*

[1] Payment of $59,519.32 of this amount withheld.
[2] Payment of $143,441.68 of this amount withheld. This figure also includes a debit adjustment of mail revenue of $3,132.00 recorded on the books in April 1934.
[3] Payment of $42,931.62 of this amount withheld.
[4] Payment of $66,748.80 of this amount withheld.
[5] Payment of $51,782.01 of this amount withheld.
[6] Italics indicate losses.



(b) During the period from 1930 to 1933, inclusive, the average cost to the Government for transporting air mail on all air mail lines was reduced from 98 cents per mile for 1930 to 54 cents for 1933.

(c) Up to the time of the cancellation of the air-mail contracts on February 19, 1934, air transportation operators found it difficult to conduct their operations at a profit without revenues derived from air mail, and, as shown from the tabulation in Table 2, all of the plaintiff carriers were sustaining losses for the period immediately preceding the dat of cancellation, even with air-mail revenue included. A reasonable conclusion on the part of the plaintiff carriers was that, without air-mail revenues, losses from operations we to be expected. Because of the disqualifications imposed by the terms of the advertisement of March 30, 1934, the plaintiff carriers were precluded from obtaining air-mail revenue by bidding for an air-mail contract, and it did not appear reasonable to expect that a substitute cargo could be obtained or an increase in their other sources of revenue could be had which would enable them to operate without sustaining substantial losses. In that situation the plaintiff carriers undertook to protect their interests by having an affiliated corporation, United Air Lines, Inc., which was not under disqualification to bid because of the ruling of the Postmaster General, submit bids for the new Routes A. M. 1, A. M. 9, A. M. 11, and A. M. 12, referred to in Finding 123, and to permit this affiliated corporation to use the flying and ground properties of the several carriers in the event that it was successful in obtaining contracts under the bids submitted by it.

127. When the Post Office Department order of February 19, 1934, was entered by the Postmaster General, United Aircraft & Transport Corporation, a Delaware corporation, owned all issued and outstanding capital stocks of Pacific Air Transport and Boeing Air Transport, Inc., and substantially all of the outstanding capital stock of National Air Transport, Inc. United Aircraft & Transport Corporation also owned all issued and outstanding capital stock of United Air Lines, Inc., a Delaware corporation, which since July 1, 1931, had acted as a management corporation for the air transport companies in the United system.

Such transport companies were then using uniform flying equipment and were under common ownership and management, so that their properties were readily adaptable on short notice to the transportation of air mail, passengers, and express over the consolidated Route A. M. 1 and the new Routes A. M. 9, A. M. 11, and A. M. 12.

128. Pursuant to the arrangements above set forth and the advertisements of March 30, 1934, United Air Lines, Inc., submitted bids of 39½ cents per airplane mile for the transportation of air mail on Routes A. M. 9, A. M. 11, and A. M. 12, and a bid of 38 cents per airplane mile for the transportation of air mail on Route A. M. 1. United Air Lines, Inc., did not, in submitting bids for less than 100 percent of the maximum rates specified in the advertisements for bids, mean that it regarded those rates as more than fair and reasonable compensation, or as fair and reasonable compensation, for the service called for. Rather, it submitted its several bids below the maximum rates specified in those advertisements in order that it might be sure to be the lowest bidder and thus obtain air-mail contracts with resulting revenues which, whether fair or not, would be for its best interest.

129. United Air Lines, Inc., was the only bidder for the contracts to carry air mail on Routes A. M. 1, A. M. 11, and A. M. 12, and on May 4, 1934, contracts for temporary air-mail service were entered into between United Air Lines, Inc., and the defendant at rates of compensation substantially less than the rates in effect under the air-mail route certificates for the transportation of air mail on those routes formerly known as Routes A. M. 8, A. M. 5, A. M. 17, and A. M. 18 as shown in Finding 124. By agreements dated August 7, 1934, between United Air Lines, Inc., and the defendant, the temporary air-mail contracts for Routes A. M. 1 and A. M. 12 were extended to May 7, 1935, and the temporary air-mail contract for Route A. M. 11 was extended to February 28, 1935. United Air Lines, Inc., was not successful in its bid for the transportation of air mail on Route A. M. 9 between Chicago, Illinois, and Fort Worth and Dallas, Texas, formerly Route A. M. 3, since its bid of 39½ cents per airplane mile was substantially in excess of that of the Braniff Airways, Inc., which bid 22½ cents

per airplane mile. May 4, 1934, a contract was entered into between the defendant and Braniff Airways, Inc., as the lowest bidder, providing for the transportation of air mail on Route A. M. 9.

130. In the summer of 1934, United Aircraft & Transport Corporation was reorganized under a reorganization plan conforming to certain requirements imposed by the Air Mail Act of 1934, approved June 12, 1934 (48 Stat. 933). As a part of such reorganization plan, United Air Lines Transport Corporation, the plaintiff in Nos. 43032 and 43033, was incorporated under the laws of the State of Delaware on July 20, 1934. August 31, 1934, United Aircraft & Transport Corporation was dissolved and on that date, pursuant to the reorganization plan, United Air Lines Transport Corporation acquired, by transfer from United Aircraft & Transport Corporation, the entire outstanding capital stocks of Pacific Air Transport, Boeing Air Transport, Inc., and United Air Lines, Inc., and substantially all of the outstanding capital stock of National Air Transport, Inc. December 27, 1934, the three air-mail contracts of United Air Lines, Inc., dated May 4, 1934, as extended August 7, 1934, were transferred with the written consent of the Postmaster General to United Air Lines Transport Corporation. February 28, 1935, the temporary air-mail contract for Route A. M. 11 was further extended to May 7, 1935, and on May 8, 1935, the three air-mail contracts of United Air Lines Transport Corporation for the transportation of air mail on Routes A. M. 1, A. M. 11, and A. M. 12 were extended for an indefinite period pursuant to the provisions of the Air Mail Act of 1934.

131. In order to be able to perform its air-mail contracts of May 4, 1934, for Routes A. M. 1, A. M. 11, and A. M. 12, United Air Lines, Inc., acquired by purchase from Pacific Air Transport and Boeing Air Transport, and by purchase and lease from National Air Transport, Inc., all of their flying equipment and ground properties (except hangar properties located on former Route A. M. 3 at Kansas City and Dallas) previously used in connection with air transport operations on Routes A. M. 8, A. M. 18, A. M. 5, A. M. 17, and A. M. 3. May 1, 1934, Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc., discon-

tinued air transport operations. May 1, 1934, United Air Lines, Inc., commenced the transportation of passengers and express by aircraft on Routes A. M. 1, A. M. 9, A. M. 11, and A. M. 12, and May 8, 1934, also commenced the transportation of air mail on Routes A. M. 1, A. M. 11, and A. M. 12, using for such air transport services the physical properties and equipment acquired by it from Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc. United Air Lines, Inc., also continued passenger and express operations on former Route A. M. 3 from Chicago to Fort Worth and Dallas from May 1, 1934, until May 12, 1934, and continued passenger and express operations on the Chicago-Kansas City portion of that route until May 31, 1935. Operations on that route were discontinued as soon as practicable after it was ascertained that United Air Lines, Inc., had not been successful in its efforts to obtain a contract for the transportation of air mail on that route. Operations between Chicago and Kansas City confined to passengers and express were continued somewhat longer, because the low bidder, Braniff Airways, did not have multimotored equipment and users of air transportation residing in Kansas City requested that service by United be maintained until the equipment situation of the low bidder was improved. Airmail, passenger, and express services were continued by United Air Lines, Inc., on Routes A. M. 1, A. M. 11, and A. M. 12 until December 27, 1934, at which time all operations on those routes were taken over and thereafter continued by United Air Lines Transport Corporation under the several air-mail contracts of May 4, 1934, as extended.

132. Pacific Air Transport, Boeing Air Transport, Inc., and National Air Transport, Inc., earned mail compensation for the transportation of mail by aircraft on Routes A. M. 8, A. M. 18, A. M. 5, A. M. 17, and A. M. 3 during January 1934 and the first 19 days of February 1934. In accordance with usual practice, advance payments for the month of January 1934 were made pending audit and final approval by the General Accounting Office. The balance due the three carriers for air-mail transportation services rendered to and accepted by the defendent in January 1934 and the entire compensation due them for air-mail transportation services rendered to and accepted by the

defendant during the first 19 days of February 1934 were withheld by defendant and have not been paid to them or their successors. The unpaid amounts due for compensation earned during January 1934 and during the first 19 days of February 1934 are as follows:

Docket No.	Route	Carrier	Amount
43029	A. M. 8	Pacific Air Transport	$59,519.32
43030	A. M. 18	Boeing Air Transport, Inc	143,441.68
43031	A. M. 5	Boeing Air Transport, Inc	42,931.62
43032	A. M. 17	United Air Lines Transport Corporation, successor to National Air Transport, Inc.	66,748.80
43033	A. M. 3	United Air Lines Transport Corporation, successor to National Air Transport, Inc.	51,782.01
		Total for all routes	$364,423.43

133. Plaintiffs' computations of the amount of damages sustained through the cancellation of their route certificates are based upon an application of the rates in effect under their route certificates at the date of cancellation to the miles flown [1] on schedules in effect on February 19, 1934, from that date to April 5, 1936, the expiration date of their route certificates, less the additional expense saved in not

[1] On February 19, 1934, under their mail pay schedules then in effect, plaintiffs were flying approximately 26,000 miles per day on Routes A. M. 5, 8, 17, and 18, the routes on which the United Air Lines, Inc., was the successful bidder after the route certificates were canceled. Plaintiffs, United Air Lines, Inc., or the latter's successor, United Air Lines Transport Corporation, continued to fly these same schedules throughout the period February 19, 1934, to April 5, 1936. On some of these trips plaintiffs, or these successor companies, were not carrying mail but only passengers and express. The "miles flown" referred to in this finding represents miles flown regardless of whether mail was being carried. The advertisements for bids which became a part of the contracts provided for a total daily mileage on the trips specified of approximately 17,000 miles as compared with the pay mileage being flown on February 19, 1934, of approximately 26,000 miles. In addition the advertisements provided in part:

> 2. The schedules to be authorized will require continuous trips, or as continuous as may be practicable to be operated between terminal points and on such frequency as deemed advisable.
>
> 3. The Department reserves the right to modify or change the schedule and frequency thereof; to dispatch mail on any plane of the contractor flown over the route; and to require night flying, if the needs of the service demand and operating conditions will permit.

What pay mileage was actually flown during the period February 19, 1934, to April 5, 1936, is not shown by the record.

handling the mail from February 20, 1934, to May 8, 1934, when the Army was carrying the mail, and less the amount of air-mail compensation paid during the period beginning May 8, 1934, and ending April 5, 1936, by the defendant to plaintiffs' successor companies under the temporary air-mail contracts of May 4, 1934, for the transportation of air mail over substantially the same routes, except Route A. M. 3 where a successor company was not the successful bidder. The computations follow:

(a) PACIFIC AIR TRANSPORT

Route A. M. 8 (Seattle-San Diego)

Compensation payable under the route certificate for Route A. M. 8, from February 20, 1934, to May 7, 1934, based upon schedules and rates in effect Feb. 19, 1934	$151, 076. 89	
Less: Estimated expenses saved by Pacific Air Transport in not handling air mail during this period	4, 893. 92	
Difference for period from Feb. 20, 1934, to May 7, 1934		$146, 182. 97
Compensation payable under the route certificate for Route A. M. 8, from May 8, 1934, to April 5, 1936, based upon schedules and rates in effect Feb. 19, 1934	$1, 395, 322. 11	
Less: Compensation paid to successor companies for transportation of air mail on Route A. M. 11 (formerly Route A. M. 8) from May 8, 1934, to April 5, 1936, including additional mail compensation retroactively allowed by a ruling of the Interstate Commerce Commission on June 12, 1939 (232 I. C .C. 608), in the amount of $11,067.03	887,775. 23	
Difference between air-mail compensation payable to Pacific Air Transport under its route certificate and compensation actually paid to successor companies for services from May 8, 1934, to April 5, 1936		$507, 546. 88
Total		$653, 729. 85

The payment of $11,067.03, referred to in the above tabulation as having been allowed by a ruling of the Interstate Commerce Commission (232 I. C. C. 608), resulted from a revised ruling by the Commission in proceedings begun by it on the basis of Section 6 (a) of the Air Mail Act of 1934 (48 Stat. 933) in which it was empowered and directed to fix the fair and reasonable rates of compensation for the transportation of air mail by airplane under the provisions therein outlined. The original order of the Commission (206 I. C. C. 675) was dated March 11, 1935. The plaintiff companies, or their successors in interest, were parties to these proceedings insofar as they were then engaged in air-mail transportation.

(b) By a similar computation the amount of damage shown for Boeing Air Transport, Inc., on Route A. M. 18 (Chicago-San Francisco) exclusive of the Omaha-Watertown Extension, except for the period February 19, 1934, to March 4, 1934, is $879,465.69. In a similar manner the amount shown for the same company on Route A. M. 5 (Salt Lake City-Seattle) is $240,716.86; and for United Air Lines Transport Corporation, successor by merger and consolidation to National Air Transport, Inc., for Route A. M. 17 (New York-Chicago) is $500,608.14.

134. Since a successor company was not the successful bidder on Route A. M. 3 (Chicago-Dallas), the damage claimed on that route except as to physical properties is based upon the period from February 20, 1934, to May 12, 1934, the date when National Air Transport, Inc., ceased flying that route, such computation being set out as follows:

UNITED AIR LINES TRANSPORT CORPORATION

(Successor to National Air Transport, Inc., on Route A. M. 3, Chicago-Dallas)

Compensation payable under the route certificate for Route A. M. 3, from Feb. 20, 1934, to May 12, 1934, based upon schedules and rates in effect Feb. 19, 1934	$135, 857. 88
Less: Estimated expenses saved by National Air Transport, Inc., in not handling air mail during that period	3, 597. 45
Difference for period from Feb. 20, 1934, to May 12, 1934	$132, 260. 43

Claim is also made on Route A. M. 3 on account of certain fixed properties located in Kansas City, Missouri, and Dallas, Texas, as follows:

KANSAS CITY PROPERTIES

In 1931, National Air Transport, Inc., constructed upon leased ground at the Kansas City Municipal Airport, a large hangar at an original cost of $117,705.23. It had a depreciated cost on May 12, 1934, of $100,940.82. During the period from May 12, 1934, to December 31, 1939, rentals were received in the amount of $21,843.93 and expenses chargeable to the property were $3,933.09, resulting in a net income of $17,910.84. During that period efforts to sell the property were unsuccessful. The average annual gross rental realized during the 5½ years ended December 31, 1939, was $3,971.62. If the same average rental is realized from May 12, 1934, to December 31, 1949, the expiration date of the lease, the total rental, computed for convenience over a period of 15½ years, would be $61,560.11. The difference between that figure and the cost of the property, less accrued depreciation to May 12, 1934, is $39,380.71.

DALLAS PROPERTY

The Dallas property, consisting of land, hangar, aprons, and a fueling system was acquired and constructed beginning in April 1931, and completed in February 1932, at a total cost of $70,874, and its depreciated cost at May 12, 1934, was $64,531.45. The property was listed for sale and finally sold December 1, 1939, for $25,500. During the period from May 12, 1934, to November 30, 1939, rentals received amounted to $15,402 and expenses chargeable to the property were $7,983.34, resulting in a net income of $7,418.66. The difference between depreciated cost at May 12, 1934 ($64,531.45), and the amount realized from the sale of the property on December 1, 1939 ($25,500), is $39,031.45 which, when reduced by the net income from the property during that period ($7,418.66), leaves a net amount claimed as a loss on account of this property of $31,612.79.

AMOUNT SOUGHT TO BE RECOVERED UNDER DEFENDANT'S COUNTERCLAIMS

135. One of the grounds advanced by the defendant is that if it is determined that plaintiffs' route certificates were issued as a result of fraud, collusion, or a conspiracy, or that plaintiffs violated Section 3950 of the Revised Statutes, all payments made under the route certificates were illegally made and may be recovered by the defendant except to the extent that the plaintiffs may establish the amounts which they are entitled to keep on a *quantum meruit* basis. The total amounts paid to the plaintiffs under each of the route certificates from the dates of issuance to February 19, 1934, the date of annulment, are as follows:

Docket No.	Route No.	Amount
43029	8	$3, 152, 374. 49
43030	18	9, 639, 173. 62
43031	5	2, 921, 602. 48
43032	17	3, 873, 344. 12
43033	3	3, 823, 458. 72

136. Another ground of the counterclaims is based on the contention of the Government that where no more than 25 cubic feet of space was authorized on a trip, Section 4 of the Air Mail Act, as amended by the McNary-Watres Act of 1930, did not permit the payment of more than 40 cents per mile. The Government's contention on this point is that since Section 4 of the McNary-Watres Act set out 1 cubic foot of space as being the equivalent of 9 pounds of air mail and that the contract rate not to exceed 40 cents per mile was to be paid for a weight space of 25 cubic feet, or 225 pounds, any payment made by the Government in excess of 40 cents where the space authorization did not exceed 25 cubic feet constituted an overpayment. On that basis detailed computations were submitted showing overpayments as follows:

Docket No.	Route No.	Amount
43029	8	$876, 146 74
43030	18	560, 830. 60
43031	5	499, 836. 79
43032	17	346, 737. 70
43033	3	477, 939. 91

All payments under the route certificates, including the alleged overpayments set out above, were made pursuant to orders issued by the Post Office Department authorizing payment. Orders were issued subsequent to March 4, 1933, for payments similar to those which were issued prior thereto. At no time did the total rate paid exceed $1.25 per mile.

137. The third ground of the counterclaims is the contention of the defendant that where space authorizations exceeded 25 cubic feet, payment of more than 40 cents per mile over a particular route was improper where the greatest amount of mail carried at any one time did not exceed 225 pounds (the statutory equivalent of 25 cubic feet) on more than 50 percent of the trips made in any one month. In applying the formula set out in Finding 109, the Post Office Department issued a regulation May 3, 1930, which read as follows:

> 1. Where the stated authorization in a plane is exceeded and a second section is not required, the excess will be balanced against the deficiency at the end of each month and, if a deficiency still remains, there will be no change in the payment for that month. * * * An excess of [*sic*] 50% or more of the trips during the month will call thereafter for the next higher space unit.

No corresponding regulation was promulgated to provide for a change to a lower bracket where there was a deficiency on more than 50 percent of the trips made in any one month, although such a regulation did exist with respect to the railway mail service. On the basis, however, that where the space authorization was for more than 25 cubic feet, payment of more than 40 cents per mile was improper where the greatest amount of mail carried at any one time did not exceed 225 pounds on more than 50 percent of the trips made in any one month, detailed computations were submitted showing overpayments as follows:

Docket No.	Route No.	Amount
43029	8	None
43030	18	$393, 578. 08
43031	5	266, 879. 94
43032	17	101, 202. 99
43033	3	173, 653. 43

138. Under the route certificates, payments were made on the basis of space authorizations as set out in the formula referred to in Finding 109, or later similar formulae, regardless of whether all the space authorized was used. Detailed computations were submitted by the defendant showing the percentage of unused space during the period the route certificates were in effect as follows:

Docket No.	Route No.	Percentage
43029	8	56.4
43030	18	50.6
43031	5	63.1
43032	17	49.1
43033	3	64.3

By applying the above percentages to the total payments made under the several route certificates (see Finding 135), overpayments are shown as follows:

Docket No.	Route No.	Amount
43029	8	$1,777,939.21
43030	18	4,877,421.85
43031	5	1,843,531.16
43032	17	1,901,801.96
43033	3	2,458,483.96

139. The final ground of counterclaim under which the defendant seeks recovery is that by reason of the consolidation of Route A. M. 32, which had a contract rate of 9 cents per pound, with Route A. M. 5, which originally had a contract rate of $3 per pound, and the application of a higher rate than 9 cents per pound to the entire route after the consolidation became effective, an overpayment to plaintiff in Docket No. 43031 was made in the amount of $918,630.57. The detailed steps which were followed in the issuance of these two contracts and their final consolidation are set forth in Findings 21 to 38 inclusive. The overpayment is computed as follows:

Amount paid for former route A. M. 32 portion of route A. M. 5 after consolidation to December 31, 1933	$1,012,475.55
Amount that would have been paid if rate had remained at 9 cents per pound after consolidation	93,844.98
Difference	$918,630.57

All payments sought to be recovered under Findings 135 to 139, inclusive, were payments which were made to plaintiffs or their predecessors in interest after approval by the Comptroller General of vouchers submitted by the Post Office Department. In connection with the audit of the vouchers, the Post Office Department furnished to the Comptroller General monthly reports of weights of mail carried by the various air-mail contractors on their respective trips.

140. The contracts which were surrendered by plaintiffs or their predecessors in interest in exchange for the route certificates involved in these proceedings were secured through open competitive bidding and the route certificates were issued under the governing statute (McNary-Watres Act) in effect at the time of their issuance.

141. Plaintiffs, at the May 19–June 30 conference hereinbefore referred to, made an agreement and combination with the other conferees and with Postmaster General Brown that they would, if called upon to do so, accept extensions to their routes and sublet those extensions to persons to be nominated by Postmaster General Brown. Such persons were to be those named by the conferees, as to the seven routes upon which the conferees agreed upon persons to operate the routes, and were to be any persons nominated by Postmaster General Brown as to the five routes as to which the conferees did not agree upon persons.

Plaintiffs also at the conference and by their conduct thereafter entered into a combination and agreement with other air-mail operators, including the Aviation Group, Transcontinental Air Transport, and Western Air Express, Inc., and with Postmaster General Brown, that they would not bid upon or seek to obtain contracts for air mail by competitive bidding, even though advertisements inviting such bids should be published unless they should be designated by Postmaster General Brown as the operators selected to bid on such routes. They further agreed that they would use their efforts and influence to persuade others not so selected to refrain from bidding or to withdraw bids already made.

The above agreements and combinations were entered into by plaintiffs for the purpose of preventing competitive bidding for air mail contracts and thereby excluding from the

industry persons who desired to enter or continue in the industry, and maintaining the high rates which Postmaster General Brown was paying plaintiffs for the carriage of air mail, and keeping in favor with the Postmaster General who had large discretionary powers over their rates and services and who, as plaintiffs well knew, desired to prevent competitive bidding in the industry.

Plaintiff Boeing Air Transport, Inc. also agreed with Postmaster General Brown that it would accept, as an extension to its Chicago-San Francisco route, an air mail route from Omaha to Watertown, South Dakota, and would sublet this route to a person to be designated by Postmaster General Brown. The purpose of this agreement was to assist Postmaster General Brown in avoiding putting this route up for competitive bidding.

142. Postmaster General Farley acted in good faith, after extended investigations and on the basis of the evidence referred to in Finding 120, in issuing the orders of February 9, 1934 (Finding 115) for the annulment of the air-mail route certificates involved in these proceedings.

The court decided that the plaintiffs were entitled to recover the sum of $364,423.43 as follows: Pacific Air Transport, No. 43029, $59,519.32; Boeing Air Transport, Inc., No. 43030, $143,441.68; Boeing Air Transport, Inc., No. 43031, $42,931.62; United Air Lines Transport Corporation, No. 43032, $66,748.80; and United Air Lines Transport Corporation, No. 43033, $51,782.01.

The court further decided that plaintiffs were not liable under the several grounds of defendant's counterclaim, and recovery under said counterclaim was accordingly denied, and the counterclaim was dismissed.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiffs are three corporations belonging to one group known to the air transportation industry as the Boeing, or United, group. They are called "United" in this opinion. These three companies, or their predecessors, held, on February 19, 1934, five separate "route certificates," or authorizations to carry air mail for the United States for compensation. Pacific Air Transport had a certificate for route 8,

from Seattle to San Diego. Boeing Air Transport had a certificate for route 18, from Chicago to San Francisco, and one for route 5, from Salt Lake City to Seattle. National Air Transport, Inc., had two certificates, one for route 17, from New York to Chicago, and one for route 3, from Chicago to Dallas. Effective on February 19, 1934, the Postmaster General, acting for the defendant, canceled these certificates, as well as all other then outstanding route certificates held by other carriers for the carrying of air mail, and refused to give further mail to any of the certificate holders to carry. For some weeks the United States Army carried the air mail in its planes. Then the routes were advertised for bids, the advertisement disqualifying any company from bidding whose route certificate had been canceled, as plaintiffs' had been.

The United group to which plaintiffs belonged had in it a management corporation, called United Air Lines, Inc., which had not been a holder of one of the canceled certificates and which was therefore not disqualified to bid, and which did bid successfully for four out of the five routes formerly flown by plaintiff companies. Pursuant to these bids, the defendant made contracts, later extended, with United Air Lines, Inc., for flying the mail for periods extending beyond April 5, 1936, the date of termination written in the canceled route certificates. Plaintiff companies then turned over to United Air Lines, Inc., the equipment which they had been flying over these routes, and beginning on May 8, 1934, it carried passengers, express, and mail as plaintiffs had done. But, though plaintiffs concede that payments to United Air Lines, Inc., were, in substance, payments to plaintiffs, yet they claim that these payments were less than what plaintiffs would have received under the canceled route certificates. Plaintiffs are suing for the difference. They are also suing for pay earned before February 19, 1934, the date on which they ceased carrying air mail, but never paid them, and for pay from February 19 to May 8, 1934, the date on which Air Lines, Inc., began to carry the mail.

As to one of the routes flown by one of plaintiffs before cancellation, route 3, from Chicago to Dallas, Air Lines, Inc., was not the successful bidder for the new air mail contract on

that route, and National Air Transport, predecessor of plaintiff United Air Lines Transport Corporation, which had before the cancellation been flying it, soon abandoned it. The planes and other movables were transferred to other uses by the United group of companies. Plaintiff, United Air Lines Transport Corporation, seeks damages for the loss of the value of hangars in Kansas City and Dallas, as well as for the loss of compensation from February 20 to May 12, 1934.

The Postmaster General based his cancellation order of February 9, 1934, effective February 19, 1934, upon Section 3950 of the Revised Statutes and upon his general powers as Postmaster General. Section 3950 is as follows:

> No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract; and if any person so offending is a contractor for carrying the mail, his contract may be annulled; and for the first offense the person so offending shall be disqualified to contract for carrying the mail for five years, and for the second offense shall be forever disqualified.

Plaintiffs assert in these suits that they were not guilty of a violation of Section 3950 of the Revised Statutes, nor were they guilty of any other conduct which justified the cancellation; that the route certificates were contracts which the defendant breached by the cancellation; and that plaintiffs are entitled to damages for the breach.

The defendant asserts that plaintiffs did violate R. S. 3950, and were guilty of other corrupt and unlawful conduct which justified the defendant in cancelling the route certificates; that in any event the certificates were not contracts, and imposed no legal obligations upon the defendant upon which a claim for damages for breach can be predicated; that if the certificates were contracts, plaintiffs can, under Section 1846 of the Postal Rules and Regulations, recover only a month's pay. The defendant also asserts counterclaims against plaintiffs for large amounts for alleged overpayments made to plaintiffs during the several years before cancellation.

These counterclaims are discussed at the end of this opinion.

The story of the events leading up to the February 1934 cancellation may be summarized as follows:

For some years before 1916 the Post Office Department and others had been requesting Congress to make funds available for an air-mail service. In 1916 Congress did so, but when the Department advertised for bids, none was received. In 1918 an air-mail service between New York City and Washington, D. C., was established, the Army operating the planes. A few months later the Post Office Department took over the operation, and provided air-mail service until 1927, adding new routes up to a total of 5,551 miles. The Department hoped to demonstrate the feasibility of flying for the carrying of mail and for other purposes, and to get private enterprisers to carry air mail under contracts. Even before 1927 some of the service had been contracted for with private carriers.

In 1925 Congress passed "An Act to encourage commercial aviation and to authorize the Postmaster General to contract for air-mail service" (43 Stat. 805). In 1925 the Post Office Department advertised for bids and awarded contracts for the carriage of air mail, including two of the five contracts later converted into route certificates involved in these cases. Another of the route certificates here involved originated in a contract made in 1926 and the other two in contracts made in 1927. Each of these five contracts was awarded as a result of competitive bidding.

The Act of 1925 provided for compensating the carrier by giving him an agreed percentage, not to exceed four-fifths, of the postage received by the Government for the mail carried. By an amendment of 1926 (44 Stat. 692) compensation was to be computed on an agreed basis per pound-mile. A further amendment in 1928 (45 Stat. 594) was known as the "Kelly Amendment." It provided that an air mail carrier who had given satisfactory service for a period of two years or more might, upon the surrender of his contract, be given a "route certificate" which would authorize him to carry air mail over the route for a total period of not to exceed ten years from the time he began to carry air mail under his contract. The purpose expressed by the Committee of the

House of Representatives which presented the amendment was to give air mail contractors a longer tenure in view of the large investments which they had to make to equip themselves to carry air mail. The amendment provided that the holder of the certificate "shall have the right of carriage of air mail over the route set out in the certificate so long as he complies with such rules, regulations, and orders as shall from time to time be issued by the Postmaster General for meeting the needs of the Postal Service and adjusting air mail operations to the advances in the art of flying." It provided that the certificate might be canceled at any time for willful neglect to carry out such regulations, with sixty days' written notice of intended cancellation and an opportunity to answer given. It provided that compensation should be determined by periodic negotiation between the holder of the certificate and the Postmaster General but should never exceed the rate set in the surrendered contract.

On August 1, 1928, the then Postmaster General reduced the postage rate on air mail substantially, which greatly increased the amount of such mail, for which air mail carriers were being paid at an agreed rate per pound-mile.

Although several air mail routes, including two of those involved in these cases, had operated under contract for at least two years and thus were eligible for route certificates under the Kelly Amendment, no route certificates were granted by the then Postmaster General up to the time he left the office on March 4, 1929. On that date Walter F. Brown became Postmaster General. He took a great interest in air mail. He thought, and early expressed to air mail operators the thought, that the service was costing the Government too much. He thought that a space-mileage, instead of a poundage, basis of payment should be adopted, i. e., that compensation should be based upon a specified amount of space available in the plane rather than upon the pounds of mail actually carried on a particular trip. He thought that air mail carriers should carry passengers and express, so that as those parts of the business increased, the cost to the Government of carrying air mail could be reduced. He consulted and corresponded with air mail carriers and with passenger carriers about the problems of the service. He

formed the opinion that the route certificates authorized by the Kelly Amendment, which could be modified only if the carrier consented and which did not permit a raise in rates, even if the contract rates should prove to be too low, did not give the Department sufficient control over rates and service.

Brown desired to foster the development of commercial aviation, and to use the air mail and its compensation for that purpose. He thought that the Department should have the power to compel air mail carriers to provide facilities for passengers, which most of them were at that time unwilling to do. He wanted to be able to give air mail and the accompanying pay to passenger carriers who were not able to make both ends meet in their passenger operations. He thought the existing air mail "map" was illogical, and that because of political and community pressure the service was, in some places, expensive to the Government and unnecessary. He thought that consolidations and extensions could be wisely made which would improve the service and reduce the cost.

Brown expressed his views to Committees of Congress, and was asked by members of the Appropriations Committee of the House of Representatives to draft a bill embodying his recommendations. In consultation with representatives of the carriers, he drafted H. R. 9500, which was introduced in the House of Representatives on February 4, 1930. Its text is given in Finding 67. That bill embodied the views indicated above, and in Section 4 contained this language: "* * * when in his [the Postmaster General's] opinion the public interests shall so require, he may award such contracts by negotiation and without advertising for or considering bids." Brown desired to have this provision in the statute for the reason *inter alia* that he wished to be able, in awarding air mail contracts, to take into consideration the "equities" which, in his opinion, passenger carriers who had pioneered when the business was unprofitable, had acquired in the areas where they had operated.

Brown and others from his Department appeared before the House Committee on Post Offices and Post Roads in support of the bill. He pointed out that the privilege of awarding contracts without competitive bidding was unusual, but

gave reasons for and urged its adoption. Representatives of air mail and passenger-carrying lines, including these plaintiffs, also appeared to urge the adoption of H. R. 9500. March 24, 1930, the Committee reported the bill favorably, without substantial change. Two members of the Committee filed a minority report opposing the bill because it permitted the award of contracts without competitive bidding. Speaker Longworth advised Brown that he thought the bill could not be passed without amendment to meet this opposition. The bill was amended, passed, and signed by the President on April 29, 1930 (46 Stat. 259). It became known as the McNary-Watres Act, or the Watres Act. Its text is reproduced in Finding 71. It omitted the discretion relating to competitive bidding and the provision for giving consideration to the equities of air mail and other aircraft operators in the awarding of air mail contracts. At the request of Brown, there was inserted in Section 6 the words "and passenger transportation," thus empowering the Postmaster General to require a carrier, in order to obtain and retain an air mail route certificate, to provide such facilities for carrying passengers as the Postmaster General might prescribe.

Brown had up to this time issued no route certificates under the Kelly Act because of his hope of obtaining the new and more satisfactory legislation. When some of the four-year contracts let in 1925 and 1926, including three of the contracts here involved, were about to run out, he extended them for six months hoping that before the end of that time the new legislation would be enacted. Again in April, 1930, some of the extensions were about to expire, and the Department advertised for bids for contracts for two months' periods, reserving the right to withdraw the advertisements if the pending air mail legislation was enacted before May 5. As we have seen, the legislation was approved by the President on April 29. No contracts were therefore awarded, but route certificates were issued under the provisions of the Watres Act on May 3, two of them being to plaintiffs. When the advertisements just mentioned were published, Brown sent word to plaintiffs who were holders of the expiring contracts that the advertisement was not an unfriendly act, apparently meaning thereby that he thought that the two-

month term offered was so short that it would not attract any competitive bidders.

After the Watres Act became law, there was much discussion among Department officials, including Brown, and representatives of air carriers, as to what could be done under the act to further the purposes which Brown had expressed while the legislation was pending and before. Many questions were asked, particularly as to whether the Postmaster General could recognize the "equities" of passenger-carrying pioneer lines who had not had air mail contracts. Many requests for such assistance were made. It was suggested to the Postmaster General that a passenger carrier could be given air mail by the process of making a geographical extension to an existing route, with the understanding that the extension would be assigned or sublet to a carrier who had an "equity" in the territory.

On May 15, some two weeks after the Watres Act was approved, Brown instructed the Second Assistant Postmaster General, W. Irving Glover, to invite certain air mail and passenger-carrying operators to a conference with Brown on May 19, at the Department. The operators specified were the principal ones in the industry, and included plaintiffs' group. The conference met on May 19. Brown, Glover, and Earl W. Wadsworth, Superintendent of Air Mail in the Department, were there. Some twenty-five individuals, representing all the large operators in the industry, including plaintiffs, and a number of smaller ones, were there. Some came who had not been invited but had heard of the meeting from ones who were invited. Wadsworth made some shorthand notes, though not a complete record, of what was said at the opening session of the conference. His transcript of those notes is in Finding 78. It contains the following statement concerning what the Postmaster General said:

> The Postmaster General opened the meeting by discussing the general provisions of the Watres Bill and invited suggestions from those present as to the ways and means of assisting the passenger operators, inasmuch as it is understood none of the so-called strictly passenger lines are breaking even and it is apparent that they will need some assistance if they are to continue. The P. M. G. expressed the desire to know

whether it is going to be possible for the so-called pioneers to agree among themselves as to the territory in which they shall have the paramount interest. He outlined certain prospective routes that were in contemplation somewhat as follows: a Southern Transcontinental route from Los Angeles to San Diego, thence to Fort Worth and Dallas; also a route from New York to St. Louis and Kansas City and Los Angeles; from St. Louis to Tulsa and Fort Worth; from St. Paul to Winnipeg; possibly from St. Paul and Minneapolis to Omaha; possibly a route south from Cheyenne, and possibly one from Albany to Boston. He referred to the plan mentioned below.

Brown also said to the conference that he was disappointed when the Watres Act failed to give him the right to let contracts without competitive bidding, but that a further study of the act as adopted had persuaded him that a liberal interpretation of his power to consolidate and extend existing or later established air mail routes could accomplish some of the same purposes, if he could arrange that those who received the extensions should sublet them to passenger carriers who did not have air mail contracts. He said that he wanted one or more transcontinental lines in addition to the one that then existed, and that each of them should be independent and competitive. He said he hoped they would work out mergers and consolidations which would enable long lines to be operated by single operators, but with due regard to the equities of those who had built up the parts of those lines. He made it plain to those present that he was asking only for suggestions and recommendations but that the decision as to what would be done was for him to make.

The Wadsworth minutes show that several of the persons present spoke, and their remarks show that they were thinking of the conference as a way of attempting to divide up the business, pursuant to the Postmaster General's suggestion, on an agreed basis based upon their "equities" in the situation, and of thus avoiding competitive bidding.

Mr. William P. MacCracken, a former Assistant Secretary of Commerce (for Air) and then a lawyer representing important companies, including Transcontinental Air Transport, suggested "grouping the representatives together according to locality, in order to work out the details of the

plan, or any other plan that might be gotten up, suggesting they might even have four committees, or an eastern and a western committee."

Brown invited the meeting to use the room they were in, which adjoined his office, for their further deliberations and suggested that they form a committee. He then left the meeting, as did Glover and Wadsworth. The Department on the same day issued a press release announcing the conference. Its text appears in Finding 78.

The meeting continued and MacCracken was elected chairman. Several important officials of plaintiffs' group, including Col. Paul Henderson, were present. Brown had brought to the meeting a map showing twelve routes which he desired to establish. The chairman named each route and asked those present to indicate whether they claimed interests in that route. Nearly every operator present claimed an interest in the route from Los Angeles to New York, via Kansas City, St. Louis, Columbus, and Pittsburgh. There were several claimants for each of the important routes. Plaintiffs' group, under the name "United" appears on MacCracken's notes as a claimant on seven of the twelve routes when the first call was made.

United did not desire the establishment of most of the new routes proposed by the Postmaster General, since it already had the only existing transcontinental route, from New York via Chicago to San Francisco, as well as other valuable routes, and mail would be diverted from those routes if the proposed new ones were established. All these claims of United, except the one for No. 12 from Seattle to Vancouver, were withdrawn later in the conferences by Henderson on the instruction of his superior, Philip G. Johnson. The conferences went on, principally at places in Washington other than the Department, until June 4. United representatives were not present at most of these outside meetings but they remained in Washington and kept in close touch with the conferences for the purpose of protecting United's interests. They reconciled themselves to the Postmaster General's determination to establish the new routes, and desired not to antagonize him.

On June 4, 1930, the conferees met again in the Post Office Department and reported to the Postmaster General (Find-

ing 90) that agreement had been reached on seven of the twelve routes, "while as to the remaining five there are still some matters in controversy". Among the five were the two proposed new transcontinental routes. This report appears in full in Finding 90. The report shows *inter alia* that during the negotiations United had offered to give up its contract on its line south of Kansas City in exchange for "some other line of equal value", in order to facilitate the purposes of the conference.

When the report was submitted, the Postmaster General expressed disappointment that no agreement had been reached on the really controversial questions. The group then said they would file a supplemental report which they did later on the same day. It said:

> The Committee has instructed me to advise you that the representatives of all of the parties involved in the controversies desire to submit these controversies to you as arbiter and agree to be bound by your decision.

The meetings of the May 19–June 4 period were devoted to the question of how to evade the McNary-Watres Act. The purpose of that Act, so far as it concerned competitive bidding, was well known to the principal operators present, including Henderson, plaintiffs' spokesman at the meeting. They had urged the enactment of H. R. 9500, of which the power to award contracts without competitive bidding was one of the principal objects. They knew that the House of Representatives had pointedly refused to grant that power. At the opening of the May 19 meeting Brown, as we have said, had reminded them of his disappointment that H. R. 9500 had not been enacted and had expressed his hope of awarding contracts by the processes of extension and subletting under a "liberal" construction of the Watres Act. Both Brown and the conferees understood that the purpose of resorting to these processes would be to avoid competitive bidding.

While the word "extension" is necessarily indefinite in meaning, its purpose could not possibly cover such a circuitous performance as Brown here suggested and, as we shall see, later carried out. The power to promote the public convenience and economy by adding a segment to an air mail

line, so that there could be continuity in its service and the facilities already existing over the rest of the line could be used in its service, was the obvious purpose of the power to grant extensions. To grant an extension to an existing line flown by A, with the understanding that the extension was to be immediately sublet to B who would fly the extension and receive the pay for it, is the opposite of that purpose. Such a device could not have any other purpose so far as these conferees were concerned than that of awarding an air mail contract to B without his having to obtain it by competitive bidding. In the instances in which the device was used, it was used for that purpose only.

This, then, was one of the devices which had been suggested to the Postmaster General before the meeting, and which he proposed to the meeting. The remarks of plaintiffs' representative, Henderson, who spoke first in response to the Postmaster General's opening statement at the meeting, were noted in the Wadsworth minutes as follows:

> "I believe it is quite possible for this group to work out a plan." He asked for instructions from the P. M. G. as to some policy. He mentioned extensions and then assigning such extensions to some operator who has no air-mail contract. He indicated the air-mail contractors would be willing to agree to such a plan.

We think that, to whatever extent the operators agreed to this device, at the meetings or thereafter, they made a combination to avoid competitive bidding. As we shall see, they did agree, and carried out their agreement to have contracts awarded by this device, whenever the Postmaster General requested them to do so.

We further think that the principal conferees, including plaintiffs, in the conferences, and in the reports showing the allocation of the seven lines and the submission to the Postmaster General of the determination as to the five lines, and by their conduct thereafter agreed with each other and with Brown that each would make no claim for, or attempt to obtain the right to carry air mail over one of those lines unless he was the one named in the allocation or selected by the Postmaster General. While the thinking of the conferees during the conference may have been largely along the line

of the contracts being awarded by extensions rather than on bids following advertisements, it was never expressly so limited, and the principal conferees, including plaintiffs, always conducted themselves thereafter as if their agreements applied to contracts awarded after advertisement for bids as well as to contracts awarded by extension. The agreement was scrupulously followed by all the principal parties, including plaintiffs.

The parties understood that these agreements were not binding upon the Postmaster General. That is, of course, immaterial. Nor is it material that Brown consented to the agreements, or urged them upon the group, and in large measure dictated the performance of them at later stages. R. S. 3950 makes no exception of a combination or agreement consented to or instigated by a public officer.

As to the events following the conference, they were, in brief, as follows:

When Brown received the conference report on June 4, he told his associates in the Department that he would submit to the Comptroller General the question of how far the Department could go in granting extensions of existing routes. On July 9, 1930, he submitted the following problem: Northwest Airways, Inc. was operating an air mail route between Chicago and Minneapolis, a distance of 694 miles. Could the Postmaster General lawfully extend it from Minneapolis via Grand Forks to Winnipeg, 445 miles, and from Minneapolis via Sioux Falls to Omaha, 340 miles? On July 24 the Comptroller General ruled that the extension to Winnipeg might be justified, but that the one to Omaha would not be. His letter appears in Finding 92.

Some time between June 4 and the end of July, 1930, the Postmaster General determined to advertise for bids on the middle transcontinental route from New York to Los Angeles and the southern transcontinental route from Atlanta to Los Angeles, and not to attempt to build these routes by extensions. He indicated to the Aviation Corporation, which had an air mail contract from New York to Atlanta, that he wanted it, as the strongest of the interested companies, to operate the southern transcontinental and to take care of the "equities" of other operators who had been carrying passen-

gers and, in some cases, mail, between some towns along the route, by buying them out or absorbing them. It will be remembered that this was one of the five routes whose disposition was submitted to the Postmaster General at the May-June conference and that at the first session of the conference, Western Air Express, Eastern Air Transport, and Southwest Air Fast Express, Inc. (Erle P. Halliburton) had made claims for consideration on this route (Finding 86).

Aviation Corporation, as is shown in Finding 94, made an agreement with Delta Air Lines, which had been operating between Atlanta and Dallas, the effect of which was that it would buy Delta out if it, Aviation, was the successful bidder for the transcontinental route. Aviation also made an agreement with Western Air Express, which was operating west of Dallas, whereby Aviation's stock in Western Air Express would be transferred to a new corporation, Transcontinental and Western Air, Inc., which was to be formed to operate the middle transcontinental route, and Aviation would acquire Western's facilities, located on the southern route, again if Aviation was the successful bidder on the southern route. As to a third operator on a part of the southern route, Southwest Air Fast Express, Inc., whose President, Halliburton, was a persistent and vigorous claimant for an air-mail contract, Aviation agreed with Southwest that Aviation, through a subsidiary which had the requisite night-flying experience prescribed in the advertisement for bids, and Southwest would submit a joint bid for the southern route, and, if their bid was successful, would form an operating company, one-half of whose stock would be owned by each; and that Aviation should have an option for a specified time on Southwest's stock in the operating company. Some of Southwest's hangars and facilities were located on the middle route, and Aviation made an agreement with Transcontinental and Western Air, which was being formed to bid on the central route, whereby the latter would buy these facilities, if Aviation Company obtained the contract on the southern route.

On August 1, 1930, Aviation sent a telegram to Wadsworth, Superintendent of Air Mails, saying: "We are satisfied to have advertisement published tomorrow". The advertisement was published August 2. Aviation, which, through its

nominees, was the only bidder, bid 100 percent of the maximum rate, was awarded the contract, and the various conditional agreements mentioned above were carried out.

Aviation was in its conduct described above obeying the directions of Brown and arranging for the elimination of competitors. When the process of elimination was complete, it advised Brown and a pretense of advertising for competitive bids was made. Aviation felt safe in bidding 100 percent of the possible maximum because the other large operators, including plaintiffs, had agreed to leave the disposition of this route to Brown, who had selected Aviation for it, and because it knew that plaintiffs, already having the New York-Chicago-San Francisco route, and Transcontinental Air Transport and Western Air Express, who were known to be about to receive the middle transcontinental route, were forbidden to bid by Brown's doctrine, which had no legal basis, that each of the three transcontinental routes must be separately owned.

We consider next the middle transcontinental route, New York to Los Angeles via Pittsburgh, Columbus, St. Louis, and Albuquerque. At the May-June conference, United, i. e. plaintiff's group, and Transcontinental Air Transport, at first made claims for consideration on the route. Several other companies, including Aviation, Western Air Express, and Southwest Air Fast Express, made claims for one or the other half of the route. Henderson, after two or three of the meetings, and after consultation with his superior, Johnson, withdrew plaintiffs' claim to this and to most of the other proposed routes.

Transcontinental Air Transport had been operating a passenger service over this middle route, using the railroads by night and planes by day. Western Air had been operating passenger planes from Los Angeles to Kansas City. Both these companies were strong financially. Brown advised these companies that if they would form a combination to operate the route as a single unit, he would give them the air mail contract. Sheaffer, of T. A. T., reported to his executive committee on July 15, as follows:

> The Postmaster General having indicated that he could and would arrange so that an air mail contract award would be properly made to the central transcon-

tinental providing the two companies organized for the operation of the service, T. A. T. got together with the Western Air Express on a plan to form an operating company, on the following basis, namely:

* * * * *

This report was, it will be remembered, made nine days before the Comptroller General's Winnipeg decision of July 24, putting limits on the process of extensions. Brown, however, testified that he did not at any time think that he could create the middle transcontinental route by the extension process, so he apparently intended to award the contract after following the forms of competitive bidding. The two companies agreed to form a new company, Transcontinental and Western Air, each taking 47½ percent of its stock and awarding 5 percent to Pittsburgh Aviation, which claimed some interest along the route in the Pittsburgh area.

When it was learned that bids were to be taken for the middle route, a Mr. Letson, President of United States Airways, Inc., which had a passenger plane operation between Kansas City and Denver, and had been trying to get an air mail operation for that route, became interested. He promoted the formation of a new company, United Avigation, Inc., in which his company, along with Pittsburgh Airways, Inc. and Ohio Air Transport, joined. Outside capital was promised and an oral option was secured on planes. The sole purpose of Avigation being to bid for and, if successful in the bidding, to operate the middle transcontinental route, it was agreed that Avigation would be dissolved if the contract was not obtained. In that respect it resembled the various contingent arrangements made by Aviation in preparation for bidding on the southern route.

The formation of Avigation aroused Transcontinental Air Transport. It will be remembered that Holland, an old friend of Henderson, had been taken to the May conferences by Henderson, and had stated there that he represented the United States Airways, Inc., Letson's line from Kansas City to Denver, though he really had only a civic interest in it. He had then notified Letson of the meetings, given him a note of introduction to MacCracken who was presiding over the meetings, and Letson had, after the first two days, par-

ticipated in them. When Sheaffer, of Transcontinental Air Transport, learned that Letson was forming a company to bid on the middle transcontinental route he telephoned Holland. Holland testified about the conversation that Sheaffer said *inter alia*: "Lou, what kind of a fellow is this fellow Letson that you sent in that meeting? * * * Well he is certainly raising the devil over here." Holland understood Sheaffer to mean by his conversation that Letson "had organized or was attempting to organize a company to bid on some of these contracts, putting this company in after the recommendations went in." Holland, apparently feeling a sense of guilt at having introduced Letson into the May conference, telephoned Letson, reminded him that he had injected Letson into the picture, told him that his attitude was entirely wrong. Letson testified: "It was his idea that I was violating something that I did not understand, and I could not see that I was violating anything. I thought I had a perfect right to bid on this contract * * *." Letson testified about Holland's call as follows:

> Well, he told me plenty. He told me that it was not the Postmaster General speaking but it was the same thing and that if I went on with the organization of Avigation Corporation that I was just out of the air mail business, I never would get an air mail contract and neither would the company that I represented, * * *.

Sheaffer of T. A. T. (Transcontinental Air Transport) thus made it plain that he regarded Letson's preparation to bid when T. A. T. and Western Air had been selected by the Postmaster General for the route, as a breach of the conference agreement and not the conduct of a gentleman.

MacCracken, counsel for T. A. T., submitted written suggestions to the Department as to the requirements to be put into the advertisement for bids. One of these, which caused much subsequent controversy, was a requirement that a bidder, to qualify, must have had at least six months experience in operating aircraft on regular night schedules over a route 250 miles or more in length. There was also a provision that "in the event a bid is submitted jointly by two companies, the experience of either company, or both, will be acceptable insofar as the requirements of the advertisements

are concerned." These suggestions were accepted by the Department and the advertisement was rewritten to include them. The night flying experience would disqualify Avigation. T. A. T. could not qualify under it, but Western Air could, so their joint bid would meet the requirement.

The advertisement was published on August 2, 1930, the bids to be filed by and opened on August 25. Two bids were filed, one the joint bid of T. A. T. and Western Air, and the other that of Avigation. The joint bid was for 97½ percent of the maximum rate permitted by the statute, and Avigation's bid was for 64 percent. As soon as the bids were opened, Hinshaw, of Aviation, the sole bidder on the southern route, and Henderson, representative of plaintiffs, asked Letson for a conference and met with him at his hotel. There Henderson told Letson that they had come to talk about the bid, that Avigation had bid too low, and that it could not carry out the contract for the rate it had bid. Letson's testimony of Henderson's statement is "We [Avigation] were going to lose a lot of money and we ought to get together on that deal * * *." The conference broke up shortly because of a quarrel between Henderson and Adams, an associate of Letson, as to whether reports made by air mail operators to the Government as to the costs of operation were truthful or not. Letson regretted Adams belligerent attitude because it prevented him from learning what Henderson and Hinshaw's proposition was.

Henderson offered no explanation of this visit and was not questioned about it by plaintiffs' counsel. It could have had no other purpose than, by persuasion, or compromise, to cause Letson to withdraw or modify the only bid for the middle transcontinental route which stood between the high bidder, who was the Postmaster General's choice, and the contract. United and Aviation were serving their own interests, and the interests of the combination, by attempting to eliminate the only real threat of competitive bidding that was allowed to spring up during the entire administration of Brown, under a statute which had pointedly refused him the power to award contracts without competitive bidding, except by extension of existing routes. Henderson's interest, on behalf of plaintiffs, in eliminating from the field such

operators as Avigation, is shown by a letter which he had written on June 26 to Johnson, his superior, saying, *inter alia*:

> Strange as it may seem, it looks as though the PMG can get by the Comptroller General with this plan of his. After all, if he can and does, I think probably it is the best thing that could happen. It will stabilize prices and stop much of this milling around that has been going on, and will make our rates on the New York-Chicago and Chicago-San Francisco lines less a target for criticism than they might be if they had to be compared to ridiculous rates which would of course result from bidding.

Avigation's bid of 64 percent was 25.6 cents per mile. Aviation, on the southern route, had bid 100 percent of 40 cents, and before the contract was written persuaded Brown to increase the rate to 75 cents, though the anticipated and later realized amount of mail was less than on the middle route. Plaintiffs were, at this time, receiving 65 cents per mile on their Seattle to Los Angeles route for the same reserved space, 25 cubic feet, and on their other routes, with larger reserved space, the correspondingly higher figures shown in the table given in Finding 109.

In the Department, Mr. Coleman, Acting Postmaster General in the absence of Brown, asked John Lord O'Brian, Acting Attorney General, for an opinion on the legality of the night flying requirement in the advertisement and was advised that it was illegal. Glover, Second Assistant Postmaster General, who had participated in the May-June conference, instructed Gove to line up all the failings in the bids and wire him what he found wrong with them "especially Avigation," and directing him not to accept any "strengthing documents" to the bids. This did not prevent the Department from accepting a brief from MacCracken on behalf of the joint bidders attacking Avigation's bid.

W. G. Skelly, of Tulsa, Oklahoma, a heavy stockholder in Letson's United States Airways, wrote Letson on August 21 at Kansas City, saying that he (Skelly) had been in Washington for a week and in constant touch with the Postmaster General and representatives of most of the big air lines, and advising Letson, on the basis of his Washington conversa-

tions, that Letson should stand aside until the transcontinental contract was let—

> * * * and then when contracts on contributory lines came up, you would be in a splendid position to get favorable consideration.
>
> I know that the Post Office Department and other interests feel very kindly disposed toward the United States Airways and that you will get very favorable consideration.

This letter was not received by Letson until after he filed his bid, he having left Kansas City before it arrived. He testified that he probably would not have filed the Avigation bid if he had received it before filing.

Though the contract was not awarded to Letson's competitors for more than a month after the bids were opened, Letson was convinced, by September 11, that he would not get the contract even if the night flying requirement were held to be illegal. He did not, however, withdraw his bid, though he forbade his associates in Avigation to continue to attempt to get political assistance for Avigation's bid. He desired to get Avigation dissolved and to get back to Kansas City without further jeopardizing his chances of getting an air mail contract by extension and subletting for his Kansas City-Denver line.

On October 1, Brown awarded the contract to T. A. T. and Western Air. Coburn of Aviation assisted Letson in persuading his recalcitrant associate in Avigation to permit Avigation to be dissolved. A few months later, Aviation, which had a line reaching to Kansas City, was asked by Brown to accept an extension from Kansas City to Denver and sublet the extension to Letson's United States Airways.

Henderson's activities in obtaining the award of the middle route contract to Transcontinental and Western Air could hardly have been limited to the abortive effort of himself and Hinshaw to "get together" with Letson and eliminate his low bid. On October 9, a few days after the award of the contract, Sheaffer of T. A. T. wrote Henderson as follows:

> Now that the smoke has cleared away, and T. A. T. and Western Air Express have been awarded a contract and have set up a new operating company, I have a little breathing spell and I wanted to drop you a note to ex-

press our appreciation of your great help in bringing about this conclusion, which was so important to our welfare as well as the welfare of the Aviation industry.

I personally greatly value your assistance and cooperation, and any time that I can be of assistance to you, I hope you will not hesitate to call on me.

In replying to this letter Henderson said, *inter alia:* "If you think that I have been helpful in the matter of getting this contract squared-away, and I am sure that I have, * * *." Sheaffer gave no satisfactory explanation, at the hearing, of what he was thanking Henderson for. Henderson likewise gave no satisfactory explanation. He attributed the thanks principally to his intercession with the Comptroller General to approve payment of the bills to Sheaffer's line for carrying the mail on the new route. In this Henderson was mistaken, as the carriage of the mails did not even begin until some time after Sheaffer's letter was written, and the Comptroller General's first letter to Brown questioning the legality of the contract was written on the same day that Shaeffer wrote to Henderson.

As we have just said, the Comptroller General on October 9 wrote the Postmaster General questioning the propriety of awarding the contract to the high bidder. Brown replied on October 23 pointing out reasons why Avigation did not meet the specifications and was not a responsible bidder. The Comptroller General replied on December 16, definitely ruling that the night flying requirement was illegal, and asking for an elaboration of reasons why Avigation was not a responsible bidder. At some time while this question was pending, Brown asked Henderson to intercede with the Comptroller General to get the contract approved. Henderson, who was a personal friend of the Comptroller General, did so. The Comptroller General told Henderson that the whole air mail situation was a mess and that he should get out of the business. He said, however, that he supposed he would have to approve the contract, which he did by a letter dated January 10, 1931.

The May-June conferees may have at the time of the conference been thinking principally in terms of awards by extension and, where it was desired to give a contract to an operator who did not have a mail contract, or did not have

one over an adjacent route, subletting of the extension to him. This process of extension and subletting for this purpose, specifically proposed by plaintiffs' executive Henderson, who, outside the meeting, expressed the opinion that the scheme went "way and beyond" the intent of the statute, was an evasion of the statute. The agreement of the conferees to accept extensions as requested by Brown and hand them over to his nominees could, so far as the participants in the conference were concerned, have had no other purpose than to give selected operators the emoluments of air mail contracts without giving competitors, who might be willing to do the work for less, the opportunity to bid. The conferees' agreement was in this respect in violation of R. S. 3950 and made their air mail contracts liable to annulment. It was an agreement to participate in a process of evasion and pretense to circumvent the well-known purpose and policy of a recently enacted statute, for the purpose of preventing the making of bids for carrying the mail.

The Watres Act provided for extensions and the Postal Laws provided in another place, U. S. C., Tit. 39, Sec. 445, for subletting. Assume that, by a sharp combination of the two devices a public official could lawfully circumvent the spirit and intent of each of the statutory permissions, for the purpose of defeating the legal requirement of competitive bidding. That still would not license the leading figures in the industry, bent on monopolizing the business and maintaining prices, to agree in advance to play their parts, not required by law, to accomplish the desired monopolistic end. They are not clothed with the statutory discretion which we have assumed for the public official, of preventing competitive bidding by sharp maneuvering. Their agreement is a naked agreement to take voluntary steps to prevent competitive bidding. Plaintiffs made such an agreement, and thereby became vulnerable under R. S. 3950.

In addition to the ground just stated we think that the record shows another valid ground for annulment under R. S. 3950. We think that the conference agreement evolved, as the necessity for such an evolution developed, into an understanding that even if the Postmaster General should be required to advertise for bids, still there would be no com-

petitive bidding by those who had participated in the conference. Aviation, which received the contract on the southern transcontinental route, so understood the arrangement. President Coburn of that company testified before the Senate Committee that he did not fear that any of the companies that had been in the conference would go back on their agreement. The chairman of the committee said "You knew they had agreed not to bid." Mr. Coburn replied, "There was no formal agreement but there was a general understanding." After a recess and testimony by Sheaffer of Transcontinental Air Transport denying that his company had made any agreement not to bid, Coburn resumed the stand in the committee hearing and asked for the privilege of making a statement in correction and explanation of his earlier testimony. In that statement he said:

> The feeling in my mind was this: We had never made any formal agreements. I think that everybody knew that my company was going to bid on the southern transcontinental and it was common knowledge amongst all of us that T. A. T. and Western Air would bid on the middle one. I am quite sure that I did not fear that the United would come down there and bid for the southern transcontinental, because the Postmaster General had said that he wanted the three independent competitive lines.

He also said "* * * there were no written agreements, no oral agreements either, in regard to bidding, that is, I did not make any." But every step in Coburn's conduct showed that he understood that if he carried out Brown's directions as to buying out Halliburton and Delta, he need have no fear of the large companies who, in a free market would have been dangerous potential competitors for the southern transcontinental. He followed these directions, advised Brown in effect that the path was clear, bid 100 percent of the maximum, received the award, and, before the contract was let, persuaded Brown to practically double the 100-percent compensation by writing the contract in a higher space bracket than either the anticipated or later realized volume of mail justified. Within a few months he was requested by Brown to accept an extension covering the Kansas City-Denver

route for the purpose of subletting it to Letson. He readily complied.

As to the middle route, the understanding was the same. Sheaffer's report to his executive committee; his violent protest to Holland about the "kind of a fellow" Letson was in proposing to bid for a line that had not been allocated to him; the proprietary attitude of MacCracken, acquiesced in by the Department, in writing specifications for the purpose of disqualifying Letson; the meticulous care with which the Department picked flaws in Letson's bid; the prompt reaction of Henderson for plaintiffs and Hinshaw for Aviation against Letson's having submitted a bid; Coburn's assistance to Letson in having Avigation dissolved with the result that the only competitive bidder who ever appeared throughout Brown's entire administration was no longer even in existence; Henderson's intercession with the Comptroller General to have the contract which had been awarded according to the understanding approved; these show how Aviation, Transcontinental and Western Air and its constituent companies, and plaintiffs' United group regarded the allotment of the air mail business by Brown.

Plaintiffs were not, of course, so active in carrying out the plan as were Aviation and the Transcontinental and Western Air combination. Plaintiffs already had a transcontinental route and could not, under Brown's dictum, interest themselves in another. The heart of the agreement was, of course, that the parties were to have nothing and claim nothing unless it was allotted to them by Brown. But plaintiffs had their rates to protect and maintain, and their future relations with the Postmaster General who had large powers over them. They did, therefore, whatever they were called upon to do to protect the integrity of the agreement. Henderson attempted without success to get Letson to withdraw his troublesome bid. He did enough more before the contract was awarded to elicit a warm letter of thanks from Sheaffer. Thereafter he urged the Comptroller General to approve the contract. Henderson had thought, from the beginning, that Brown's proposed activities were improper. He might well have dissociated himself and plaintiff companies from them. But to have done that would, he thought, have

offended Brown and jeopardized plaintiffs' rates, so he chose, instead of dissociating himself and plaintiffs from the agreement, to cooperate and have the benefits of that cooperation. Being parties to this combination to prevent competitive bidding, plaintiffs' contracts became liable to annulment.

We think that for a third reason, closely related to the first, plaintiff Boeing Air Transport, Inc.'s contracts became liable to annulment. Plaintiffs were called upon only once to accept an extension and sublet it to a person designated by Brown, for the purpose of preventing competitive bidding. As appears in Finding 106, Brown, in 1931, being under pressure to establish an air mail line from Omaha to Watertown, South Dakota, requested Boeing Air Transport, Inc., the one of plaintiffs' group which had the transcontinental line through Omaha, to take this lateral line as an extension. Boeing did not want it, because it was small and unprofitable, and was not required by the law to take it. Several small operators did want it, but Brown was not willing to let them bid for it. So Boeing agreed to take it, to assist Brown in preventing competitive bidding for it, and hold it until Brown should select an operator to whom it would be awarded by sublease, and not by competitive bidding. Brown never fixed upon an operator. In consequence, Boeing, which did not want the line, had it, and the several operators who did want it were prevented from bidding on it.

Taken by itself, this Watertown incident was a violation of R. S. 3950. It was an agreement between Boeing and Brown to prevent competitive bidding. It was also compliance by plaintiffs with the spirit of the agreement made at the conference. It was not within the letter of the conference agreement simply because it involved a route not included among the twelve which Brown submitted to the conference.

We have concluded, as appears from the findings and this opinion, that the evidence before us shows that plaintiffs engaged in three respects in the conduct described in R. S. 3950 as a ground for annulment of a contract to carry mail. It is not, therefore, necessary to decide, and we do not decide, whether plaintiffs could recover if the weight of the evidence before us were to the effect that plaintiffs had not engaged in

such conduct but the Postmaster General had, in good faith and upon substantial evidence, concluded that they had done so. We have in this opinion sometimes referred to plaintiffs' route certificates as contracts. It is not necessary to decide, and we do not decide, to what extent, if at all, these route certificates had the usual legal attributes of contracts.

We do not regard the annulment of plaintiffs' route certificates on February 19, 1934, as having forfeited air mail pay earned by them before the annulment, even though not paid them at the time of the annulment. Plaintiffs may, therefore, recover the amount of such accrued pay.

The Defendant's Counterclaims

The defendant asserts that it is entitled to recover counterclaims against plaintiffs on five grounds. These grounds appear in Findings 135–139. They are, to some extent, alternative and overlapping rather than separate and independent grounds. Under the first, the defendant claims that plaintiffs' route certificates were obtained as a result of fraud, collusion, or conspiracy, and that therefore the defendant should recover all that it paid plaintiffs for carrying the mail under the certificates except what plaintiffs have proved the services to be reasonably worth on a *quantum meruit* theory. Plantiffs have offered no such proof. We do not find that plaintiffs improperly secured their route certificates. The loan of money by Henderson to Gove, of the Department, was highly improper, in view of Henderson's frequent and important dealings with the Department. There is, however, no evidence that plaintiffs were aware of or reimbursed Henderson for the money advanced to Gove, or that Henderson was motivated by any reason except personal friendship for Gove. We do not find that plaintiffs obtained anything from the Department by reason of Henderson's dealing with Gove. Nor do we find that plaintiffs' installation of the radio set in Brown's office was for any reason other than to assist Brown in securing the favorable interest of Congressmen and others in the air mail.

The defendant also asserts, under its first ground of counterclaim, that if, as we have found, plaintiffs violated R. S.

3950, relating to combinations in restraint of bidding, the defendant is entitled to recover back all moneys paid plaintiffs in excess of the reasonable value of plaintiffs' services. This might well be the result of a violation of R. S. 3950 in some cases. If the one against whom the Government asserted the claim had been the contractor who was awarded the contract concerning which competitive bidding was suppressed, so that it profited directly from the suppression, the relation of cause and effect between the tort and the payments received under the contract might well be such as to produce such a result. Here, however, two of plaintiffs' five route certificates were awarded before the May 19–June 4 conferences and one during the conference and before it had reached its conclusions. As to the other two, the important New York-Chicago and Chicago-San Francisco routes, the certificates were issued on October 21 and 22, 1930. Plaintiffs were entitled to the certificates under the statute if the Postmaster General was willing to award them. We have little doubt, however, that if a low competitive bidder, such as Avigation, had secured the contract on the adjoining middle transcontinental route, plaintiffs' rates under its certificates would have had to be set substantially lower than they were to avoid odious comparisons. This was the idea expressed by Henderson in his letter of June 26 to his superior, Johnson, quoted in this opinion. In these circumstances, plaintiffs could hardly complain if they were treated as beneficiaries of the wrongful combination, who should disgorge the benefits and receive instead the reasonable value of their services. We do not know, however, what would have been the award on the middle route, nor at what rate, if it had been open to real competitive bidding. On the whole we have concluded that plaintiffs are not liable under the defendant's first ground of counterclaim.

The defendant's second ground of counterclaim is that plaintiffs were overpaid in many cases because, under the route certificates, they were paid more than 40 cents per mile for a reserved space for air mail of 25 cubic feet or less, whereas Section 4 of the statute set 40 cents as a maximum for such an amount of space. We think, however, that Section 6 of the act permitted the Postmaster General to pay a

per mile rate up to $1.25 on a route certificate regardless of the amount of space reserved, even though 40 cents was set by Section 4 as the maximum under a contract. Since plaintiffs were not paid more than $1.25 a mile, the defendant may not recover on this ground.

The third ground of counterclaim is that on many of plaintiffs' runs space in excess of twenty-five cubic feet was reserved and paid for, though on most actual flights on these runs less than twenty-five cubic feet of space was used. The Department had a regulation that if a certain space was reserved and the actual mail exceeded the space on more than half the trips during a month, the next higher space unit would be called for thereafter and paid for. The regulation did not call for a corresponding reduction in case the space reserved was not fully used. These were the defendant's regulations, and even if they were improvident and resulted in overpayments it does not appear that they were the result of collusion between plaintiffs and the Department. We deny this ground of counterclaim, as we do also the next one which seeks a refund for unused space for the reason that throughout the period of these route certificates only some 40 percent of the space reserved and paid for was actually used. But plaintiffs were paid for furnishing the space, which they did, and for carrying whatever mail was given to them to carry, which they did.

The defendant's final ground of counterclaim is that the consolidation of Route A. M. 32, which had a contract rate of 9 cents per pound, with A. M. 5, which had a contract rate of $3 per pound, resulted in the payment of a higher rate, not, however, $3 per pound, for the consolidated route, which constituted an overpayment. The Watres Act, approved April 29, 1930, removed the prohibition against paying a higher rate under a route certificate than the rate set in the contract superseded by the certificate. On May 3, the Postmaster General awarded a route certificate in exchange for the contract on Route 5. On May 27, he consolidated the two lines. The rates paid after the consolidation were not substantially different from those paid on plaintiffs' other lines. This ground of counterclaim is not well founded.

We conclude (1) that there were valid grounds for the annulment of plaintiffs' route certificates, and that the several annulments did not constitute breaches of contract; (2) the plaintiffs are entitled to the pay accrued before the annulments; (3) that the defendant is not entitled to recover on its counterclaims.

It is so ordered.

WHALEY, *Chief Justice*, concurs.

WHITAKER, *Judge*, took no part in decision of this case.

JONES, *Judge*, concurring:

I concur in the result. I also concur in the reasoning by which that conclusion is reached.

I would add this further comment. I do not think the men who took these contracts had much choice in the light of the facts of record. This was a great new industry in which the country was vitally interested. Its development was fraught with risks and losses and called for daring as well as vision.

Postmaster General Brown was charged with the duty of letting the contracts. He sought broader authority than was finally given him. After studying the amended act he called in the representatives of the industry and told them what he wanted done and also advised them that under a liberal construction of the act he thought he was authorized to pursue the method which he outlined.

Naturally they went along. What else could they do? They had their investments, as well as being responsible for the savings of many small investors who had faith in the future of aviation. It was what the responsible administrator not only invited them to do, but even insisted be done. While they entered the agreement or combination to prevent competitive bidding with full knowledge that it was contrary to law, and this made the contracts subject to cancellation under Section 3950 of the Revised Statutes, their fault was not as great as if they had initiated the move.

There was no concealment. It was done openly. The meetings were held in the Department building. Press releases were issued.

Postmaster General Brown was not justified in going to the lengths he did. He was the dominant type. He was struggling at the leash. In his enthusiasm and determination he went beyond the limits of his authority.

Under the guise of extensions routes were let that by no reasonable construction could be classified as extensions. In this way actual route contracts were let without complying with the statutory requirement of competitive bidding. These contracts were *ultra vires*, in addition to being violative of section 3950, *supra*. These were all so interwoven as to give practically the entire set-up a false bottom, and there was no practical place to draw the line.

For these reasons I think that Postmaster General Farley was thoroughly justified in cancelling these contracts and reletting them in accordance with the law. He was fully authorized to take this course. In thus removing any question of validity the further development of the industry was put on a more solid basis. Regardless of any question of collusion these contracts were properly cancelled.

The plaintiffs are entitled to recover compensation at the stipulated rate while the service was being rendered.

LITTLETON, *Judge:* I concur in the result. I can not concur in the ultimate findings and in the opinion that there was a combination or agreement entered into with or by these plaintiffs in the conferences called by the Postmaster General in May 1930, or at any other time, "to prevent the making of any bid for carrying the mail," within the meaning of Section 3950 of the Revised Statutes (U. S. C., Tit. 39, Sec. 432).

Whatever plan may have been in the mind of the Postmaster General at the time of the May 1930 conference, which the prevailing opinion finds was agreed to by the parties at that conference, was not only opposed by plaintiffs at that time but also in subsequent years. All of plaintiffs' contracts which ever came into existence had been legally issued long prior to this time and came about through open competitive bidding. No fraud, conspiracy, or illegal acts were involved and their route certificates were issued under the governing statute in effect at the time of their issuance. There

is no contention to the contrary, and the prevailing opinion so finds. These contracts and route certificates were in no way affected by the events which occurred at the May 1930 conference. The May 1930 conference discussed the establishing of new routes and had nothing to do with contracts already in existence. At that time plaintiffs had the only transcontinental route and obviously it was detrimental to their interests to have additional transcontinental routes established. Up to the time of the conference they vigorously opposed the additional routes because of the adverse effect it would have on their income from existing routes. Over their objection the Postmaster General proceeded with his determination to establish not only the transcontinental routes but various routes throughout the country. None of the recommendations at the conference for which extensions were granted by the Postmaster General was in favor of plaintiffs nor were any of the routes on which the parties failed to reach an agreement for a recommendation routes for which plaintiffs were making any claim. The suggestion that plaintiffs entered into a combination or agreement and observed it in order to protect their rates is not, in my opinion, supported by the record. It is difficult to see how plaintiffs would be parties to an agreement which was so directly opposed to their interests in the event the agreement was carried out and wherein they would and did obtain nothing. Not only do I think there was no agreement arrived at at the May conference of the character referred to in the prevailing opinion but, in any event, I cannot see plaintiffs as party to any such combination or arrangement.

The meeting was open to the public. The publicity representative for the Post Office Department was present and issued a press release at the time. During the period of the conference, the Second Assistant Postmaster General reported to Congress that the conference was being held and minutes were kept of what occurred. Intelligent men of the type here involved would hardly follow such a course in connection with an unlawful combination or conspiracy.

Plaintiffs were not only opposed to the transcontinental routes which the Postmaster General wanted to and did establish but they were opposed to the lengths to which the

Postmaster General went in making extensions. The prevailing opinion treats all these extensions as a part of the general plan formulated at the May conference. Plaintiffs' representatives vigorously opposed these extensions and went to the extent of initiating one or perhaps two investigations by Congress of these acts of the Postmaster General. It hardly seems reasonable to say that these parties entered into a combination or agreement and scrupulously observed it when at the same time they were in active opposition to what the Postmaster General indicated he was going to do, and also having these acts of the Postmaster General investigated by Congress.

I think the record not only fails to show the existence of a combination or agreement within Section 3950 of the Revised Statutes but also shows facts directly opposed thereto. I do not think that anything Postmaster General Brown did after the May conference was in any way controlled or governed by any agreement at that conference. Certainly not so far as these plaintiffs were concerned. He was a man of strong determination and much interested in aviation and the air mail service. In his zeal to do what he may well have thought was for the best interests of the service he exceeded the authority given him by Congress and failed to observe Sections 3949 and 3709 of the Revised Statutes, U. S. C., Tit. 39, Sec. 429, and Tit. 41, Sec. 5, and the Watres Act. When it later appeared to the Postmaster General that express statutes had been disregarded in establishing air mail routes and letting air mail contracts, extended investigations were made both by the Congress and by the Post Office Department. The results of these investigations were reported to Postmaster General Farley and on the basis thereof, after careful consideration, he came to the conclusion that it was in the public interest to annul and cancel all existing route certificates and he did so. Having proceeded in that way on the basis of what was substantial evidence and having in mind the peculiar nature of these route certificates which, in my opinion, were subject to cancellation, his action of annulment and cancellation should be approved and sustained. In the circumstances, the propriety or legality of the Postmaster General's action in 1934 was not affected by the fact that plaintiffs were not par-

ties to any fraud or conspiracy nor had entered into any combination or agreement to prevent the making of any bid for carrying the mail within the meaning of Section 3950.

ROBERT H. MEADE v. THE UNITED STATES

[No. 45181. Decided February 1, 1943] *

On the Proofs

Pay and allowances; lieutenant, civil engineers corps, U. S. Navy; equalization act of June 10, 1922.—The equalization act of June 10, 1922, did not contemplate the comparison of the active service of a lieutenant commander who prior to the act of March 4, 1913, was entitled to include in the computation of his active service his four years at the Naval Academy and the active service of a staff lieutenant who was not so entitled under said 1913 act. *Roggenkamp* v. *United States*, 76 C. Cls. 329, cited; *Marvin* v. *United States*, 78 C. Cls. 567, distinguished.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. Philip Mechem, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff was appointed Midshipman, United States Navy, June 16, 1922; was commissioned Ensign from June 3, 1926; on August 14, 1929, was commissioned ad interim assistant civil engineer with rank of Ensign from June 3, 1926, raised to regular assistant civil engineer October 22, 1929.

On November 12, 1929, he received notice of advancement to rank of Lieutenant, junior grade, Civil Engineer Corps from June 3, 1929.

On July 8, 1936, he received notice of advancement to rank of Lieutenant, Civil Engineer Corps, from June 1, 1936.

*Petition for writ of certiorari denied June 7, 1943.

On February 7, 1938, he was commissioned regular civil engineer with rank of Lieutenant from June 1, 1936, which rank he now holds.

2. Lieutenant Commander Robert Stanley Robertson, junior, U. S. Navy, retired, has served as an officer in the Navy as follows:

1905, June 15	Appointed Midshipman
1911, June 19	Commissioned Ensign from June 5, 1911
1914, August 14	Commissioned regular Lieutenant, junior grade, from June 5, 1914
1915, September 22	Transferred to the retired list from September 19, 1915, under Section 1453, Revised Statutes
1916, January 28	Recalled to active duty, reporting February 15, 1916
1916, July 5	Detached from duty, reporting home July 14, 1916
1917, February 23	Recalled to active duty, reporting March 4, 1917
1918, September 6	Temporarily appointed Lieutenant Commander on the retired list from July 1, 1918, accepting appointment and executing oath of office September 9, 1918
1918, November 12	Appointed Lieutenant on the retired list from July 1, 1918, accepting appointment and executing oath of office December 5, 1918
1919, March 14	Temporary appointment as Lieutenant Commander revoked, reverting to status as Lieutenant on the retired list of the Navy
1919, March 15	Relieved from all active duty by order of March 7, 1919
1924, November 29	Ordered to active duty, reporting December 2, 1924
1928, May 28	Commissioned Lieutenant Commander on the retired list to rank from April 26, 1928, accepting appointment and executing oath of office May 28, 1928
1928, September 29	Detached from duty, relieved of all active duty, and ordered home, in accordance with orders of May 22, 1928, as modified July 2, 1928
1939, October 16	Ordered to active duty, reporting October 18, 1939

3. Since reporting for active duty on October 18, 1939, Lieutenant Commander Robert Stanley Robertson, junior,

has received the active duty pay and allowances of an officer of the fourth pay period.

Active duty pay and allowances of an officer of the fourth pay period for the period from October 18, 1939, to the end of the year 1939, totals $239.67.

The claim is a continuing one.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of court:

Plaintiff is an officer of the Civil Engineer Corps of the United States Navy who was appointed midshipman on June 16, 1922; was commissioned ensign from June 3, 1926; and was commissioned regular civil engineer with rank of lieutenant from June 1, 1936, which rank he now holds. Plaintiff seeks to compare for purposes of pay his record of active service with that of Lieutenant Commander Robert Stanley Robertson, Jr., who was appointed midshipman on June 15, 1905; was commissioned ensign to rank from June 5, 1911; was transferred to the retired list on September 19, 1915, and was retired, with the exception of a temporary period of active duty, until October 18, 1939, when he returned to active duty as a lieutenant commander on the retired list. Plaintiff has been receiving the pay and allowances of the third pay period as provided by the Act of June 10, 1922 (42 Stat. 625, 626) as amended by the Act of May 23, 1928 (45 Stat. 719, 720), which provides in pertinent part as follows:

> The pay of the fourth period shall be paid to * * * lieutenant commanders of the Navy * * * who have completed fourteen years service * * * and to lieutenant commanders and lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy, drawing the pay of this period.—(U. S. Code, Title 37, sect. 1)

Plaintiff under this statute claims the difference between the pay and allowances of the third pay period which he is now receiving and the pay and allowances of the fourth pay period, which is being paid to Lieutenant Commander

Robertson, for the period from October 18, 1939, to the date of judgment.

It is apparent from the facts that there is no comparison between the two services rendered by these officers. They are not comparable. Robertson was appointed a midshipman in 1905 at which time he was entitled to compute the period he was at the Naval Academy in his pay period. By the act of March 4, 1913 (37 Stat. 891) service as a midshipman at the Naval Academy was not to be counted when computing length of service for pay period purposes. See *United States* v. *Noce*, 268 U. S. 613. Deducting from plaintiff's computation of his service the time spent as a midshipman at the Academy, his active service is not comparable with the active service of Robertson. Furthermore, when this deduction is made, plaintiff has approximately thirteen and one-third years active service to his credit and not the fourteen years which would entitle him to the fourth pay period rate. Plaintiff's active commissioned service counting from June 3, 1926, when he was commissioned ensign, to October 18, 1939, is 13 years, 4 months and 16 days. Lt. Commander Robertson's active service from June 15, 1905, when he was appointed midshipman, to October 18, 1939, is 16 years, 6 months and 6 days.

In Robertson's case he counted the time spent in the Naval Academy, which he was entitled to do, as part of his active service, and had over fourteen years service and therefore was entitled to be in the fourth pay period.

Plaintiff's case is on all fours with the case of *Roggenkamp* v. *United States*, 76 C. Cls. 329, in which the court held that the plaintiff had the same length of active commissioned service but he lacked the credit of the Academy service and therefore there was no comparison between the two services for the purposes of pay. It may be further added that the services of these two officers were not concurrent.

Plaintiff entered the Naval Academy seventeen years after Robertson and therefore there could be no comparable service. Robertson was in the first world war which was several years before plaintiff even entered the Academy.

Plaintiff relies on the case of *Marvin* v. *United States*, 78 C. Cls. 567. This case is clearly inapposite.

Plaintiff is not entitled to recover and his petition is dismissed. It is so ordered.

JONES, *Judge*; and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, concurring:

I concur, but I would like to add to the majority opinion the following observations:

The fifth paragraph of section 1 of the Act of June 10, 1922, c. 212, 42 Stat. 625, 626, as amended by the Act of May 23, 1928, c. 715, 45 Stat. 719, gives the pay of the fourth period to the following officers of the Navy: (1) commanders; (2) lieutenant commanders with fourteen years service; (3) lieutenants with seventeen years service; and (4) to "lieutenant commanders and lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the Navy, drawing the pay of this period."

Lieutenant commanders of the Navy are entitled by virtue of their rank only to the pay of the third period, but if they have had fourteen years service they are entitled to the pay of the fourth period. Paragraph 5 entitles lieutenant commanders and lieutenants of the Staff Corps of the Navy to fourth period pay only when they have had a length of commissioned service equal to that which entitles lieutenant commanders of the line to that pay. This length of service ordinarily is fourteen years. Plaintiff has not had this length of service, but he says that he is nevertheless entitled to fourth period pay because Lieutenant Commander Robertson is drawing fourth period pay and because his length of commissioned service is less than plaintiff's.

This is true, but Lieutenant Commander Robertson is drawing fourth period pay because at the time he retired an officer was entitled to include the period of his service at the Naval Academy in computing his length of service; but, in 1913, prior to plaintiff's appointment to the Academy, Congress provided[1] that officers thereafter appointed were not entitled to include the period of their service in the Naval

[1] 37 Stat. 891.

Academy in computing their length of service, and plaintiff, therefore, is expressly prohibited from doing so. But, what he in effect seeks to do is to add to his commissioned service a sufficient part of Robertson's service in the Academy to bring his total commissioned service up to the required fourteen years. He would thus accomplish indirectly what he could not accomplish directly. Robertson gets fourth period pay only by including his service in the Academy. Plaintiff can get it only by adding on to his commissioned service Robertson's Academy service. This seems to me to be contrary to the intention of Congress. If an officer could not include his own service in the Academy, certainly it was not intended that he could include the service of another. The Act of 1913 is a limitation on the Act of May 23, 1928, *supra*. This plaintiff is not entitled to fourth period pay if to qualify himself therefor he must include in his length of service either his own service in the Academy or that of another.

If plaintiff can thus use Robertson's Academy service, so can every other lieutenant commander and lieutenant in the Staff Corps of the Navy and every lieutenant commander, lieutenant, and lieutenant (junior grade) of the line and engineer corps of the Coast Guard whose commissioned service comes within four years of the required fourteen years. The purpose sought to be accomplished by the Act of 1913 would thus be largely defeated. For a large number of officers appointed after 1913, Academy service would be taken into account. I am convinced that Congress did not intend this.

If plaintiff, a lieutenant, is entitled to this pay, he would be paid higher than most of the lieutenant commanders of the line who had had equal service. It was the intention of Congress to bring the pay of staff officers up to that of line officers, but it never was intended to pay them more.

Cf. *United States* v. *Lenson*, 278 U. S. 60.

MADDEN, *Judge*, dissenting.

I think plaintiff should recover.

Subdivision 4 of the fifth paragraph, section 1, of the pertinent statute says that fourth period pay is proper for "lieu-

tenant commanders and lieutenants of the Staff Corps of the Navy * * * whose total commissioned service equals that of lieutenant commanders of the line of the navy, drawing the pay of this period." The prevailing opinions translate this long expression into two words, "fourteen years." I think that if Congress had meant fourteen years it would have said so in two words rather than seventeen words.

The record gives us little light on our problem. It seems that lieutenant commanders who have been commissioned since the Act of 1913 removed the right to count time spent in the Naval Academy as a part of the period of service must have fourteen years of commissioned service to draw fourth period pay. That means, I suppose, that nearly all lieutenant commanders of the line who are at the present time drawing fourth period pay have had fourteen years of commissioned service. The prevailing opinions take the language of the fourth subdivision of the section to mean "lieutenant commanders of the line who are in the normal status of present day lieutenant commanders of the line, drawing the pay of this, (the fourth) period." But this rendering of the text is nothing but a still longer way of saying "fourteen years."

Without any real light on the subject of what Congress meant, I think the natural conclusion from what it said is that it meant that staff corps lieutenants, such as plaintiff, were to be paid fourth period pay if *any* lieutenant commander of the line, who had no longer period of commissioned service than they had, received fourth period pay. If Congress didn't mean this, it meant "fourteen years," which, as I have indicated, I doubt. If Congress did mean this, plaintiff can compare his service with Robertson, though Robertson's career was unusual because of his long period of retirement which kept him, upon reentering active service, in the fourth period pay group, though he was appointed to Annapolis before the Act of 1913.

What would be the practical consequences of holding as I would hold does not appear in the record. If they would be so disrupting or burdensome as to make it apparent that Congress could not have intended them, we have not been informed.

BEN WHITE, ARCH ROBINSON, LEE WELLS, WILLIAM S. WELLS, ARCH J. McLAREN, ARTHUR D. BARKELEW, OSCAR CLAYTON, ROBERT L. CULPEPPER, WILLIAM B. EDWARDS, THE ESTATE OF CHARLES E. WELLS, THE ESTATE OF JOHN McLAREN, THE ESTATE OF THEODORE BOWEN v. THE UNITED STATES

[No. 45710. Decided February 1, 1943]*

On Defendant's Demurrer

Jurisdiction; act conferring jurisdiction vetoed by the President; statute of limitation.—It is *held* that the bill conferring upon the Court of Claims jurisdiction to hear plaintiffs' claims, having been returned to Congress by the President with his veto, within the ten days specified in the Constitution, the Court is without jurisdiction.

Same.—As to other matters referred to in the petition of plaintiffs, it is *held* that said matters are not within the ordinary jurisdiction of the Court of Claims; and, further, that if otherwise within the Court's jurisdiction, the right to sue is barred by the statute of limitation. (U. S. Code, Title 28, sections 250, 262.)

Mr. W. B. Edwards for the plaintiff.

Mr. Thos. L. McKevitt, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The facts sufficiently appear from the opinion *per curiam*, as follows:

Plaintiffs sue for the value of lands in California of which, they allege, they were dispossessed about the year 1912, and for damages for false arrests, imprisonments, and malicious prosecutions brought about, they allege, by officials of the Department of the Interior and the Department of Justice. They allege that Congress in 1941 passed a bill giving this court jurisdiction to hear plaintiffs' claims, and that the President, because he was misled by officials of the departments named above, vetoed the bill. They further allege that the veto was not within the ten days specified in the Constitution. The defendant demurs to the petition.

*Petition for writ of certiorari denied June 7, 1943.

As to the bill conferring special jurisdiction upon this court, it never became a law, as it was, contrary to plaintiffs' contention, returned to Congress by the President within 10 days, Sundays excepted, after it was presented to him. We have no jurisdiction to give a remedy for the alleged misconduct of department officials in inducing the President to veto the bill. As to the other matters of which plaintiffs complain, the petition shows on its face that they are not within the ordinary jurisdiction of this court, and that, if they would otherwise be within our jurisdiction, the right to sue on them has long since been barred by the Statute of Limitations. (U. S. Code, Title 28, sections 250, 262.) The defendant's demurrer is sustained and plaintiffs' petition is dismissed. It is so ordered.



CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON FEBRUARY 1, 1943

44066. Alice duPont Ortiz.
45551. First Industrial Corp.
45653. Cumberland Portland Cement Co.

ON FEBRUARY 2, 1943

45094. Benjamin Clayton.
45095. Julia S. Clayton.
45216. Benjamin Clayton.
45217. Julia S. Clayton.
45780. Benjamin Clayton.
45781. Julia S. Clayton.

ON MARCH 1, 1943

45674. Dean Higgins.
45712. John A. Giaccaglia et al.
45717. Walter J. Laird et al.
45737. Fowler Brothers Company.
45740. Edwin S. Webster.
45759. Allen D. Cunningham, etc.

Cases Involving N. I. R. A. Act of June 25, 1938

ON FEBRUARY 1, 1943

44244. Joseph Reiner & Bros., Inc.
44373. Stevens Manufacturing Company.
44377. Arthur Morgan Trucking Co.
44420. Mathers Lamm Paper Company.
44519. Edward G. Budd Mfg. Co.
44520. Edward G. Budd Mfg. Co.
44521. Edward G. Budd Mfg. Co.
44522. Edward G. Budd Mfg. Co.
44524. Acme Construction Company, Inc.
44564. The Michaels Art Bronze Co.

ON MARCH 1, 1943

44285. Bartgis Brothers Company.
44334. Joseph M. Herman Shoe Company.
44370. Freyberg Bros., Inc.
44512. Fidelity and Deposit Company of Maryland.

Cases Involving Pay and Allowances

ON FEBRUARY 1, 1943

45238. Carrie Marshall Trunk, extr'x.
45397. Harlan W. Holden.
45428. Walter Bender.
45434. Charles M. Savage.
45609. John B. Maynard.

Case Involving Indian Claim

ON FEBRUARY 1, 1943

K-107. The Nez Perce' Tribe of Indians.

Case Pertaining to Government Contract

ON MARCH 1, 1943

45529. James Stewart & Co., Inc.



REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

THE STANDARD OIL COMPANY OF KANSAS v. THE UNITED STATES

[No. 43582]

[*Ante*, p. 201; 319 U. S. —]

Fraud; defendant's plea of fraud sustained by the evidence; agency.

Decided October 5, 1942; defendant's special plea sustained and claim declared forfeited. Plaintiff's motion for new trial overruled December 7, 1942.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 10, 1943.

PITT RIVER POWER COMPANY (A CORPORATION) v. THE UNITED STATES

[No. 45588]

[*Ante*, p. 253; 319 U. S. —]

Flood control; taking of private property for public use.

Decided December 7, 1942; defendant's demurrer sustained and plaintiff's petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 10, 1943.



INDEX DIGEST

AIR MAIL CONTRACTS.

I. Where, at the invitation of the Postmaster General, representatives of air line operators, including plaintiffs, met in Washington and after conferences among themselves, agreed to the allocation to certain of such conferees of seven proposed air mail routes and further agreed to submit to determination by the Postmaster General of the allocation of five other such routes; and where, thereafter, none of said operators, including plaintiffs, made any attempt to obtain the right to carry air mail over any of said routes unless such operator was so designated in said allocation or selected by the Postmaster General in accordance with said agreement, all without competitive bidding; it is *held* that such agreement was in violation of section 3950, Revised Statutes, and contracts held by parties to such agreement were subject to annulment by the Postmaster General in accordance with the provisions of the statute.—*Pacific Air Transport, et al.*, 649.

II. While representatives of air line operators, in conference, agreeing to the allocation of air mail contracts without competitive bidding, may have been thinking largely along the line of such contracts being awarded by extensions of routes rather than on bids following advertisements, such agreement was never expressly so limited, and the principal conferees, including plaintiffs, always conducted themselves thereafter as if their agreements applied to contracts awarded after advertisements for bids as well as to contracts awarded by extension. *Id.*

III. It is immaterial that the Postmaster General consented to agreements to allocate air mail routes without competitive bidding, or that the Postmaster General urged such agreements upon the operators of air mail lines called into conference by him; section 3950, R. S., makes no exception of a combination or agreement consented to or instigated by a public officer. *Id.*

IV. The obvious purpose of the power conferred by statute upon the Postmaster General to grant "extensions" of air mail routes was to promote the public convenience and economy by adding a segment to an air mail line, so that there would

CONTRACTS—Continued.

the Bureau of Standards test, of which failure the plaintiff was not informed; it is *held* that the action of defendant's representatives amounted to a change of contract and plaintiff is entitled to recover the additional cost incurred by the installation of such type of valve. *Id.*

XXII. Where subcontractor on Government construction job covered the boilers with the mixture of asbestos and Portland cement called for in the specifications; and where the defendant required the subcontractor to remove this covering and replace it with another mixture; it is *held* that the fault was the defendant's in writing the specifications wrongly and plaintiff is accordingly entitled to recover. *Id.*

XXIII. Where plaintiff made no claim for extra work until after the completion of the contract; and where it is found that there was an understanding with defendant's representatives that the subcontractor would follow the directions of the architects and withhold claims for extra work until after the job was completed; and where in accordance with this understanding plaintiff submitted a number of claims, including the claim for recovering boilers and others included in the instant case, all of which claims were duly considered on their merits by the architects who made adverse recommendations on them to the Treasury Department; and where after a hearing at which representatives of both parties appeared, said claims were rejected by the Department; it is *held* that the lateness of presentation of the claims did not foreclose plaintiff. *Thompson v. United States*, 91 C. Cls. 166, 179. *Id.*

XXIV. Where subcontractor furnished the architects a shop drawing erroneously showing the vents for a dishwashing machine connected with the ventilating system, contrary to good practice; and where such a connection was not called for by the contract, which contained no language specific to the problem; and where subcontractor, over his objection, was required by the architects on written order to make the said connection; and where the arrangement did not work and the connection was later removed; it is *held* that plaintiff is entitled to recover. *Id.*

CONTRACTS—Continued.

rightful and proper conduct on the part of the Government or risks contracted for by plaintiff and paid for by the Government, and "losses" suffered by plaintiff as a consequence thereof. *Grier-Lowrance Construction Co.*, 434.

XXXII. Whether the "acts of the Government" or "delays caused by the Government" were rightful or wrongful is not immaterial under the provisions of the jurisdictional act. *Id.*

XXXIII. Absence of disclosure by the Government of "subsurface conditions unknown to the contractor" is not a ground of recovery under the provisions of the jurisdictional act where the Government not only did not know, but had no duty to know, such conditions; and where the plaintiff by the exercise of prudence could have known such conditions, having by the terms of the contract assumed the risk of such variations in the conditions of the work as actually were encountered. *Id.*

XXXIV. Where with respect to certain items of its claim, which were denied by the contracting officer, plaintiff did not file a written protest with the contracting officer within the time specified in the contract; it is *held* that this provision of the contract was waived by the contracting officer when he accepted the said claims after the work was completed and considered them on their merits. *Id.*

XXXV. Where the contracting officer was also the executive officer of the Commission which made the contract; it is *held* there could be no appeal to the "head of the department" as provided in the contract. *Id.*

XXXVI. Where it is found that the contract drawing with respect to the location of certain piles was ambiguous; and where a layout of the proposed location of the piles was made by plaintiff and presented to the contracting officer who did not discover any mistake and did not disapprove said layout; and where, after the discovery of an error in locating the piles according to said layout, plaintiff's superintendent admitted its mistake and requested to be allowed to correct it in the most inexpensive way, without removing the piles erroneously located; and where thereafter nothing occurred which would

CONTRACTS—Continued.

tion; it is *held* that the assessment of liquidated damages for late completion was, therefore, what plaintiff had agreed to, and the additional overhead for the period of delay was not the responsibility of the Government; and plaintiff accordingly is not entitled to recover. *Id.*

XLII. Where changes have been made under written change order of the contracting officer and no appeal therefrom has been taken to the head of the department as required by the contract, the terms of the change order govern and the contractor is not entitled to recover the amount by which the change order reduces the contract price. *Diamond* (No. 45420), 493.

XLIII. Where an error by contractor in calculation on which amount of bid was based was discovered before execution of contract and promise was made by Government contracting officer that mistake would be corrected if proof of mistake was submitted through regular channels, which was done; plaintiff is entitled to recover. *Rappoli*, 499.

XLIV. The equity of plaintiff's claim is obvious, and the proof that a mistake was made is adequate; the fact not having been denied by the War Department, which recommended its correction. *Id.*

XLV. An entity such as a government, which acts through many agents, must so coordinate the activities of its agents that the sum of their actions is up to the standard of fair dealing that is required of common men. *Struck Construction Co.* v. *United States*, 96 C. Cls. 186. *Id.*

XLVI. The parol evidence rule does not prevent a court from enforcing a promise made, concurrently with the execution of a contract, to correct a mistake in that contract, it being to the convenience of both parties that the contract, without the correction, be executed at the moment while time is taken to correct the mistake. *Id.*

XLVII. If the promise of the Government's contracting officer that the mistake in the contract would be corrected was made with the condition that plaintiff should put its claim and proof of mistake through "regular channels"; it is *held* that plaintiff satisfied the condition. *Id.*

WORDS AND PHRASES

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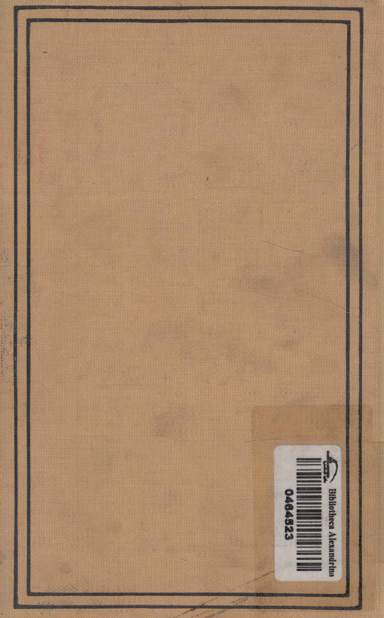











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